TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1894.

No. 253.

W. C. JONES, PLAINTIFF IN ERROR,

vs.

THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

FILED JULY 28, 1891.

(14,782.)

(14,782.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1894.

No. 253.

W. C. JONES, PLAINTIFF IN ERROR,

vs.

THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

INDEX.

	Original.	Print.
Caption	1	1
Order to file transcript from State court	1	1
Transcript from State court	1	1
Caption	2	1
Summons	2	2
Prosecution bond	3	2
Sheriff's return on summons	3	2
Declaration	5	4
Order granting leave to amend declaration	5	4
Motion for removal	6	4
Petition for removal	7	5
Bond for removal		

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 2, 1894.

	Original	Print
Order denying petition for removal	8	6
Exceptions to order denying petition for removal	8	6
Clerk's certificate	9	6
Order denying motion to remand, &c	9	7
Amended declaration	10	7
Demurrer to declaration	12	9
Order overruling demurrer	13	9
Pleas	13	9
Replication	13	10
Jury called	14	10
Verdict	14	11
Motion for new trial	15	11
Order overruling motion for new trial	15	11
Judgment	15	11
Order as to bill of exceptions	16	11
Mandate from Supreme Court United States	16	12
Caption	18	13
Order on mandate	19	13
Mistrial	20	14
Caption	20	14
Verdict and judgment	21	15
Motion for new trial	21	15
Order granting new trial	21	15
Caption	22	16
Verdict and judgment	22	16
Motion for new trial	23	16
Order overruling motion for new trial	23	16
Bill of exceptions	23	16
Evidence for plaintiff	23	17
Testimony of E. M. Thurston	23	17
M. L. Crowley	24	17
Zeke Guggenheim	24	17
R. D. Rosenheim	26	18
Wm. D. Fleming	34	23
James Sevier	36	25
Anson Bartholomew	38	26
Wm. J. Palmer	43	30
J. G. Gilchrist	48	33
Charles E. Dosser	52	36
Dr. J. P. Park	56	38
W. C. Jones	59	40
Evidence for defendant	63	43
Testimony of Andy Trusller	63	43
D. P. O'Brien	64	44
John A. Grisham	64	44
—— Weaver	65	45
G. W. St. John	67	46
C. H. Waring	68	46
Thomas Defre	68	47
Wm. Patten	70	48
Giles Jackson	71	48
Thomas Beard	71	49

	Original.	Print.
Testimony of John Cunningham	72	49
John Poindexter	72	49
Requests of plaintiff to instruct jury	73	50
Instructions to jury	79	53
Exceptions to order refusing new trial, &c	90	60
Citation and acknowledgment of service (copy)	90	60
Bond	91	61
Clerk's certificate	92	62
Writ of error	93	62
Citation and acknowledgment of service (original)	94	63

1 Be it remembered that at a circuit court of the United States for the eastern district of Tennessee begun and held at the Federal court rooms, in the city of Knoxville, within said district and the sixth circuit, on the second Monday, it being the 14th day, of January, 1884, there being no judge of the court present, the court was regularly opened by Thomas H. Reeves, United States marshal for the eastern district of Tennessee.

THURSDAY MORNING, *January 17th*, 1884.

Court met pursuant to adjournment.

Present and presiding the Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

W. C. JONES *vs.* THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD CO.	No. —. Damages.

In this cause, on motion of the defendant's counsel and by leave of the court, a certified copy of the record from the circuit court of Washington county, Tennessee, was this day filed, and bond for costs having been executed by the defendant as required by law, and because neither one of the judges of this court was present to hold sessions of the court until this date (Thursday, 17th day of January, 1884), it is ordered that the filing of this transcript on this day shall stand and be treated hereafter in all respects and for all purposes as if the said certified transcript had been filed on Monday, the first day of the present term of the court.

Transcript.

W. C. JONES)
vs.
E. T., V. & GA. R. R. CO.)

2 Be it remembered that at a circuit court began and held for the county of Washington, State of Tennessee, at the court-house, in the town of Jonesboro', Tenn., on the 3rd Monday after the 4th Monday in November, 1883, it being the 17th day of December, 1883—present and presiding, the Hon. Newton Hacker, the judge elected to hold the court for the first judicial circuit for said State—when, among other things, the following proceedings were had and ordered to — entered of record, to wit:

O. Summons. Issued December 8th, 1883.

State of Tennessee to the sheriff of Washington county, Greeting:

You are hereby commanded to summon the East Tennessee, Virginia and Georgia Railroad Company, if to be found in your county, to appear before the judge of our circuit court, to be held for the

county of Washington, at the court-house, in the town of Jonesboro', on the 3rd Monday after the 4th Monday in November, 1883, then and there to answer W. C. Jones in an action to his damage.

Herein fail not and have you then and there this writ.

Witness W. E. Mathes, clerk of our said court, at office, the 3rd Monday after the 4th Monday in July, 1883.

W. E. MATHES, *Clerk*,
By A. R. PIPER, *Deputy Clerk*.

Endorsed: W. C. Jones *vs.* E. T., Va. & Ga. R. R. Co. Issued 8th day of December, 1883. W. C. Mathes, clerk, per A. R. P., D. cl'k.

Pros. Bond. Filed Dec'r 8th, 1883.

We acknowledge ourselves indebted to The East T., Va. & Ga. R. R. Company, the def't in the above suit, in the sum of two hundred and fifty dollars, to be void on condition that W. C. Jones prosecutes an action for damages this day commenced against said E. T., V. & Ga. R. R. Co. in the circuit court of Washington county with effect, or *if* payment of all costs and damages incident on failure thereof, and pay all costs which may at any time be adjudged against W. C. Jones.

3 Witness my hand and seal this Dec'r 8th, 1883.

W. C. JONES, [SEAL.]
By CHAS. E. DOSSER, *Att'y*.
CHAS. E. DOSSER. [SEAL.]

Endorsement on O. summons.

Came to hand Dec'r 8th, 1883. Executed by sending the within to Tate L. Earnest, and agent of the E. T., V. & G. R. R. Co., there being no president or director living in my county to execute this process on this December 8th, 1883.

S. H. PONDER, *Sheriff*.

Plaintiff's Declaration. Filed Dec'r 2nd, 1883.

W. C. JONES)
vs.
EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD COMPANY.)

Declaration

The plaintiff, W. C. Jones, by attorney, complains of the defendant, The East Tennessee, Virginia and Georgia Railroad Company, a body corporate and politic under the laws of Tennessee, in a plea of trespass on the case for negligence, for that on the 16th day of July, 1883, in the town of Jonesboro', county of Washington, and State of Tennessee, the said defendant, then and there engaged in operating a railroad and running locomotives and cars thereon, because of the carelessness, recklessness, and unlawful conduct of its agents and servants in running a train through said town rapidly

and at great speed, whereby the lives of persons in said town were greatly and unnecessarily endangered, and in failing and neglecting to observe the statutory precautions against accident on railroads from trains running through cities and towns and to give the signals and warnings in such cases prescribed by law, in this instance for the safety of the public made necessary by the very situation and relation of the buildings here adjacent to the track of

4 the defendant, and also because of the defective and dangerous construction of the depot and delivering platform of defendant in said town and of the proximity of both to the track of defendant whereon said train was running so rapidly and unlawfully as aforesaid and the consequent inability of the plaintiff to see or hear said train when approaching the depot, and also because of the location of the depot aforesaid, wherein was the office of defendant for transacting its business with the public, on the opposite side of the track of the defendant from the passengers' platform of defendant, where alone the public could get on and off the trains and cars of defendant and which afforded the only convenient way of ingress and egress for the public to and from said depot and offices, on account of which the passage of the public thereto was made extremely and unnecessarily hazardous, did unlawfully and negligently run one of its locomotives, with a train attached, upon and against the plaintiff, who, in his lawful business, was crossing from said depot and office over said track to said passenger platform and had no notice or warning of said rapidly approaching train, and did then and there unlawfully, negligently, and wantonly strike and severely bruise and wound the plaintiff in his hip, body, back, and head, and did throw him with great force and violence against the delivery platform aforesaid appurtenant to the depot and thereby rendered him senseless and helpless, in consequence of which the plaintiff became sick, sore, and disabled and so remained for a long space of time, to wit, from the date aforesaid hitherto, during which time he has suffered great pain and agony, both mental and physical, and has been compelled because of said wounds and bruises and disability to abstain from, neglect, and abandon his business and to lose the profits thereof and to expend a large sum of money, to wit, one thousand dollars, in the effort to be cured of said wounds, bruises, and disabilities and in being nursed during said illness, and has, moreover, been permanently — in his body and mind thereby.

5 Wherefore the plaintiff saith that by reason of the wrongful, negligent, and unlawful conduct aforesaid of said defendant plaintiff has, without fault on his part, been injured and sustained damages to the amount of twenty-five thousand dollars, and therefore he sues and demands a jury to try the case, &c.

INGERSOLL AND DOSSER,
Atty's for Plaintiff.

Endorsed: No. —. Declaration. W. C. Jones *vs.* E. T., Va. & Ga. R. R. Co. Filed December 19th, 1883. W. E. Mathes, clerk.

Wednesday, Dec'r 19th, 1883, the following order was entered of record upon the minutes in this case, viz:

W. C. JONES
vs.
E. T., VA. & GA. R. R. Co.

In this case plaintiff comes, by att'y, and moves the court for leave to amend the declaration heretofore filed.

Thursday, Dec'r 20th 1883, the following orders were made and ordered to be entered of record, viz:

W. C. JONES
vs.
E. T., VA. & GA. R. R. Co.

In this case, on motion of plaintiff, leave *is leave* was granted him on yesterday to amend his declaration so as to ask for a jury to try the issue. Leave being granted plaintiff to so amend his declaration on yesterday (Wednesday, Dec'r 19th, 1883), this order is made and entered now for then:

W. C. JONES
vs.
E. T., VA. & GA. R. R. Co.

Came defendant, by attorney, and moved the court for leave to file its petition praying the removal of this cause from this court into the circuit court of the United States in and for the northern division of the eastern district of Tennessee; leave to file which petition was granted by the court, and thereupon said petition was accordingly filed, with a bond for costs. Whereupon the de-
6 fendant moved the court to proceed no further therein, except to make the order of removal as required by law and to accept the said surety and bond and to cause the record herein to be removed into the circuit court of the United States in and for the northern division of the eastern district of Tennessee.

Petition Filed Dec'r 20th, 1883.

In the Circuit Court of Washington County, Tennessee.

W. C. JONES
vs.
EAST TENN., VA. & GA. RAILROAD COMPANY.

Petition for removal to the circuit court of the U. S. in and for the northern division of the eastern district of Tennessee.

To said circuit court:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars: that

the controversy in said suit is between citizens of different States, and that the petitioner was, at the time of the commencement of this suit, and still is a citizen of the State of Tennessee, and that the plaintiff, W. C. Jones, was then and still is a citizen of the State of Michigan; and your petitioner offers herewith a bond, with good and sufficient surety, for his entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto; and he prays this honorable court to proceed no further herein except to make the order of removal required by law and to accept surety and bond and to cause the record to be removed to said circuit court of the United States in and for the northern division of the eastern district of Tennessee; and it will ever pray.

(Signed) WM. M. BAXTER AND
JOHN ALLISON,
Att'ys for Petitioner.

7 *Affidavit.*

STATE OF TENNESSEE, }
Washington County. }

I, John Allison, being duly sworn, do say that I am one of the attorneys for the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and the statements and allegations therein contained are true as I verily believe.

JOHN ALLISON, JR.

Subscribed by the said John Allison in my presence, and by him sworn to before me this 20th day of Dec'r, 1883.

W. E. MATHES,
C'l C'l C'k of said County.

Bond.

Know all men by these presents that the East Tennessee, Virginia a-d Georgia Railroad Company, as principal, and Wm. M. Baxter and John Allison, as sureties, are held and firmly bound unto W. C. Jones in the penal sum of five hundred dollars, the payment whereof well and truly to be made unto the said W. C. Jones, his heirs and assigns, we bind ourselves, our heirs, representatives, and assigns jointly and severally, firmly by these presents, yet upon these conditions: The said East Tennessee, Virginia and Georgia Railroad Company having petitioned the circuit court of Washington county, State of Tennessee, for the removal of a certain cause pending therein, wherein W. C. Jones is plaiatiff and East Tennessee, Virginia and Georgia Railroad Company is defendant, to the circuit court of the United States in and for the northern division of the eastern district of Tennessee: Now, if the said East Tennessee, Virginia and Georgia Railroad Company, your

petitioner, shall enter into the said circuit court of the United States on the 1st day of its next session a copy — the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold
8 that said suit was wrongfully or improperly removed thereto, then this obligation is to be void; otherwise in full force and virtue.

Witness our hands and seals this 20th day of Dec'r, 1883.

EAST TENN., VA. & GA. RAILROAD CO.,
By WM. M. BAXTER, *Att'y, Etc.*
WM. M. BAXTER, *Security.*
JOHN ALLISON, "

Endorsed: Petition. W. C. Jones *vs.* East. Tenn., Va. & Ga. Railroad Company. Filed 20th Dec'r, 1883. W. E. Mathes, cl'k.

THURSDAY, *Dec'r 27th*, 1883.

On this day the following order was made and ordered to be entered of record, to wit:

W. C. JONES)
vs.
E. T., VA. & GA. R. R. Co.)

Came the parties, by their attorneys, and came on for hearing the petition and motion of defendant for a removal of this case from this court to the circuit court of the United States for the northern division of the eastern district of Tennessee, and the same being argued and considered and the court being of the opinion that the defendant does not show itself to be within the provisions of the acts of Congress authorizing such removal, it is therefore considered by the court that said petition of defendant be dismissed and said motion be overruled, and that defendant plead to the declaration, and defendant has thirty days in which to plead so as not to delay the trial at the next term.

Monday, Dec'r 31st, 1883, the following order was made and ordered to be entered of record, viz:

W. C. JONES)
vs.
E. T., VA. & GA. R. R. Co.)

Came the def't and, by attorney, entered its exception to the action of the court had on a former day of this term, disallowing its motion to remove this case to the circuit court of the United
9 States for the northern division of the eastern district of Tennessee and dismissing its petition for that purpose and taxing it with costs.

STATE OF TENNESSEE,)
Washington County.)

I, W. E. Mathes, clerk of the circuit court for the State and county aforesaid, do hereby certify that the foregoing is a true, full, and

perfect transcript of all the record in the case of W. C. Jones *vs.* The East Tennessee, Virginia and Georgia Railroad Company as the same appears of record and on file in my office.

Given under my hand and official seal, at office, in Jonesboro', Tennessee, this 14th day of January, 1884.

W. E. MATHES,
C'l C't C'k

[Seal of the C't.]

Endorsed: Transcript. W. C. Jones *vs.* E. T., Va. & Ga. R. R. Company. No. 762. Filed Jan't 17th, 1884. A. R. Humes, clerk. Clerk's fees, $2.75. Received of John Allison, att'y for def't, $2.75 in full of my fee for transcript. W. E. Mathes, cl'k. Dec'r 14, 1884.

MONDAY MORNING, *January 21st*, 1884.

Court met pursuant to adjournment.

Present and presiding: The Honorable John Baxter, judge of the United States circuit court for the sixth judicial circuit, and the Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

W. C. JONES
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD CO. } No. —. Damages.

In this cause comes the plaintiff, by attorney, and moves the court to remand this case to the circuit court of Washington county, Tennessee; which motion, having been fully considered by the court, is hereby overruled and leave is granted the plaintiff to file an amended declaration.

In Circuit Court of United States for Northern Division of Eastern District of Tennessee.

W. C. JONES
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY.

The plaintiff, W. C. Jones, complains of the defendant, The East Tennessee, Virginia and Georgia Railroad Company, incorporated under the laws of Tennessee for the purpose of and at the date hereinafter set forth actually engaged in operating a railroad in said State and in running locomotives and cars thereon, in an action on the case for negligence—

For that on the 16th day of July, 1883, in the town of Jonesboro', Washington county, Tennessee, the depot of defendant, wherein was its office for the transaction of business with the public and to which the public were invited therefor, was so located on the opposite side of its track from its passenger platform and from the business part of said town as to require that persons going to and from said office

for the transaction of business with defendant should cross the track of the defendant whereon it was wont to run its locomotives and trains at or near said depot, and at said date the public were and for years prior to had been wont to pass and repass across said track at the west end of said depot upon the invitation aforesaid and with full knowledge of defendant, its agents and employees, and said depot of defendant and a delivery platform appurtenant thereto were in such proximity to said track and said depot was so constructed, with a long, blank wall running parallel with and close to said track, which approached said depot from the east on a curve and behind buildings obstructing the view, that said passage of
11 the public was rendered extremely and unnecessarily hazardous, and especially so from trains passing said depot westward, as their approach could not be seen by persons passing from said office over to said passenger platform by the way aforesaid, so that extraordinary care was required from the defendant in running said trains past said point so as to prevent an accident, and at said time and place the plaintiff, in his lawful business with the defendant at said depot and office, was crossing therefrom over the track aforesaid by the way aforesaid to the passenger platform aforesaid, which afforded the usual and only convenient means of exit for plaintiff from said depot and office of the defendant.

And thereupon the defendant, by its agents and employees, at the time and place aforesaid failing to sound the whistle or bell of one — its locomotives at short intervals when approaching said depot from the east and to use and employ such other precautions as were necessary in the premises to warn the public and to prevent an accident, did then and there carelessly, negligently, unlawfully, rapidly, and wantonly run said locomotive upon and against the plaintiff, crossing as aforesaid, without knowledge or notice of the proximity of said rapidly approaching locomotive and train thereto attached, and did then and there unlawfully and negligently bruise and wound the plaintiff upon his body, back, and head, and did throw him with great force and violence against the delivery platform aforesaid, whose proximity and dangerous position were well known to defendant, and did thereby render the plaintiff senseless and helpless, in consequence of which he became sick, sore, and disabled, and so remained for a long time, to wit, hitherto, during all which time he suffered and underwent great pain and was hindered from attending to his affairs and lost and was deprived of great gains, profits, and advantages thereby, and also was forced to expend divers large sums of money, amounting to one thousand dollars, in endeavoring to be cured of said wounds,
12 disabilities, bruises, and injuries, and was detained at a hotel in the town aforesaid a long time, to wit, for the space of three months, during which he incurred great expense, to wit, three hundred dollars, about his necessary expense and maintenance and was permanently disabled.

Wherefore the plaintiff saith that by reason of the said negligent and wrongful conduct of the defendant he hath been injured and

sustained damages to the amount of twenty-five thousand dollars, and therefore he sues and demands a jury to try the case, &c.

INGERSOLL AND DOSSER,
Attorneys for Plaintiff.

Endorsed: No. 762. Declaration. W. C. Jones *vs.* East Tenn., Va. & Ga. Railroad Company. Filed Jan. 24, 1884. A. R. Humes, clerk.

Demurrer.

W. C. JONES
vs.
E. T., V. & G. R. R. Co.

The defendant, by its attorney, demurs to both the original and amended declarations filed therein, and for cause of demurrer shows that plaintiff declares in an action for personal injuries alleged to have been received by def't's negligence for loss of gains and profits by reason of his having had to abandon the pursuit of his business affairs for the time being: such damages are not recoverable in this action.

WM. H. BAXTER,
Att'y for Def't.

Endorsed: W. C. Jones *vs.* E. T., V. & G. R. R. Co. Demurrer. Filed Feb'y 9, 1884. A. R. Humes, cir. c't clerk.

MONDAY MORNING, *February 18th*, 1884.

Court met pursuant to adjournment.

Present and presiding: The Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

W. C. JONES
vs.
EAST TENN., VA. & GA. R. R. Co.

13 Came the plaintiff, by attorney, and moved that defendant's demurrer to plaintiff's declaration be overruled, and the same being considered of and understood by the court, and the court, being of opinion that the ground of demurrer is insufficient, is pleased to overrule the said demurrer.

In the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

W. C. JONES
vs.
E. T., V. & G. R. R. Co.

The def't, by its attorney, comes and defends the wrongs and injuries complained of in plaintiff's original and amended declarations, and for plea says it is not guilty in the manner and form as therein alleged, and of this it puts itself upon the country, &c.

WM. M. BAXTER, *Att'y, &c.*

And for further plea in this behalf def't says that the injury complained of by the plaintiff was brought about and inflicted upon him by his own carelessness and negligence and not by the carelessness and negligence of this def't or any of its agents or servants, and this def't is ready to verify, &c.

WM. M. BAXTER, *Att'y, &c.*

And plaintiff, for replication to the second plea, says the injury complained of was not brought about and inflicted upon him by his own careless- and negligence, but by the carelessness and negligence of defendant, its agents and servants, as complained of in the declaration, and this he prays may be inquired of by the country.

INGERSOLL AND DOSSER,
Att'ys for Plaintiff.

Endorsed: W. C. Jones *vs.* E. T., V. & G. R. R. Co. Pleas. Filed Feb'y 18th, 1884. A. R. Humes, clerk. Wm. M. Baxter, att'y.

14 July Term, 1884.

Be it remembered that at a circuit court of the United States begun and held for the northern division of the eastern district of Tennessee, at the Federal court rooms, in the city of Knoxville, within said district and the sixth circuit, on the second Monday, it being the 14th day, of July, A. D. 1884—present and presiding, the Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee—the following proceedings were had, to wit:

FRIDAY MORNING, *July 25th*, 1884.

Court met pursuant to adjournment.

Present and presiding: The Honorable John Baxter, judge of the United States circuit court for the sixth judicial circuit.

W. C. JONES *vs.* THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY.	Damages.

Came the parties, by their attorneys, and came also the following jury, to wit, R. M. Hopper, W. M. Burkhardt, Silas McGuire, Wm. G. Burrow, James Varner, James A. Roxix, Charles Mason, Joseph Eckle, Samuel Pierce, Jesse Crouch, Jerry Bogart, J. G. McClanahan, good and lawful men, citizens and freeholders of the northern division of the eastern district of Tennessee, who, being duly elected, tried, and sworn to try the issue joined between the parties, are from rendering a verdict respited until tomorrow.

SATURDAY MORNING, *July 26th*, 1884.

Court met pursuant to adjournment.

Present and presiding: The Honorable John Baxter, judge of the United States circuit court for the sixth judicial circuit.

W. C. JONES
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY. } Damages.

15 Came the parties, by their attorneys, and came also the following jury, to wit, R. M. Hopper, W. M. Burkhardt, Silas McGuire, Wm. G. Burrow, James Varner, James A. Roxix, Charles Mason, Joseph Eckle, Samuel Pierce, Jesse Crouch, Jerry Bogart, and J. G. McClanahan, good and lawful men, citizens and freeholders of the northern division of the eastern district of Tennessee, who, being duly elected, sworn, and tried to try the issues joined between the parties, upon their oaths do say that they find the issue in favor of the defendant.

And thereupon the plaintiff enters a motion for a new trial.

MONDAY MORNING, *July 28th*, 1884.

Court met pursuant to adjournment.

Present and presiding: The Honorable John Baxter, judge of the United States circuit court for the sixth judicial circuit.

W. C. JONES
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY. }

Damages.

The motion of the plaintiff for a new trial in this case coming on to be heard and argument of counsel having been heard thereon and the matter being fully considered by the court, said motion is overruled.

Whereupon it is considered by the court that the defendant go hence and recover of the plaintiff and Charles E. Dosser, his security for the prosecution of this suit, all the costs of the cause, for which execution is awarded.

TUESDAY MORNING, *July 29th*, 1884.

Court met pursuant to adjournment.

Present and presiding: The Honorable John Baxter, judge of the United States circuit court for the sixth judicial circuit.

16 W. C. JONES
vs.
THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD COMPANY. } No. —.

Damages.

In this case the plaintiff tendered his bill of exceptions to the rulings, charge, and judgment of the court, which was signed and sealed and made a part of the record in this suit.

Mandate from U. S. Supreme Court. Filed June 6th, 1889.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of Tennessee, Greeting:

[Seal of the United States Supreme Court.]

Whereas lately, in the circuit court of the United States for the eastern district of Tennessee, before you or some of you, in a cause between W. C. Jones, plaintiff, and The East Tennessee, Virginia and Georgia Railroad Company, defendant, wherein the judgment of the said circuit court entered in said cause on the 28th day of July, A. D. 1884, is in the following words, viz:

"The motion of the plaintiff for a new trial in this case coming on to be heard and argument of counsel having been heard thereon and the matter being fully considered by the court, said motion is overruled.

Whereupon it is considered by the court that the defendant go hence and recover of the plaintiff and Charles E. Dosser, his security for the prosecution of this suit, all the costs of the cause, for which execution is awarded," as by the inspection of the tran-
17 script of the record of said circuit court, which was brought into the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress in such case made and provided, fully and at large appears:

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and eighty-eight, the said cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel:

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, reversed with costs, and that the said plaintiff, W. C. Jones, recover against the said defendant one hundred and thirty-eight dollars for his costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court, with directions to grant a new trial.

November 12, 1888.

You therefore are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this court, as, according to right and justice and the laws of the United States, ought to be had, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the fourth day of June, in the year of our Lord one thousand eight hundred and eighty-nine.

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

Costs of Plaintiff.

Clerk	$61 00
Printing record	57 00
Attorney	20 00
	$138 00

18 Supreme Court of the United States, October Term, 1888.

Costs of W. C. Jones in No. 58.

1885, docketing cause and filing record, $5.00; October term, appearance, .25; filing affidavit, .25; filing precipe, .25; filing papers, .75; continuance, .25	$6 75
1886, Oct. term, transfer, $1.00; continuance, .25	1 25
1887, Oct. term, transfer, $1.00; filing receipt, .25; filing papers, .50; continuance, .25	2 00
1888, Oct. term, transfer, $1.00; filing stipulation, .25; filing papers, $2.25; filing briefs, $5.00; argument, .20; judgment, $1.00; filing same, .25; recording proceedings, .40; mandate, $5.00; preparing record for printer, &c., $35.25; costs and copy, .40; printing record, $57.00; attorney's docket fee, $20.00	128 00
	$138 00

Fee Book A A, page 264.
Test:

JAMES H. McKENNEY,
C. S. C. U. S.

Minutes.

Be it remembered that at a circuit court of the United States began and held for the northern division of the eastern district of Tennessee, at the Federal court-rooms, in the city of Knoxville, within said district and the sixth circuit, on the second Monday, it being the 8th day, of July, A. D. 1889—present and presiding, the Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee—the following proceedings were had, to wit:

19 MONDAY MORNING, *July 15th*, 1889.

Court met pursuant to adjournment.

Present and presiding: The Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

W. C. JONES
vs.
EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD COMPANY.

In this cause the following mandate having been received from the Supreme Court of the United States, at Washington, D. C.:

"It is now hereby ordered and adjudged by this court that *that*

the judgment of the said circuit court in this cause be, and the same is hereby, reversed with costs, and that the said plaintiff, W. C. Jones, recover against the said defendant one hundred and thirty-eight dollars for his costs herein expended and have execution therefor; and it is further ordered that this cause be, and the same is hereby, remanded to the said circuit court with directions to grant a new trial. November 12th, 1888."

Whereupon it is considered by this court that a new trial in this cause be had, and that an execution issue against defendant, The East Tennessee, Virginia & Georgia Railroad Company, in favor of W. C. Jones, plaintiff in this cause, for the one hundred and thirty-eight dollars aforesaid.

MONDAY MORNING, *July 22nd*, 1889.

Court met pursuant to adjournment.

Present and presiding: The Honorable D. M. Key, judge, etc.

W. C. JONES
vs.
EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD COMPANY. } No. 762. Damage.

Came again the parties, by attorney, and came also the same jury as was respited on yesterday, to wit, David Stokely, M. V. Moody, W. D. Francis, T. A. Hudiburg, J. C. Moss, Wm. Whea, Dan. Ellis, Wm. Hall, P. P. Shown, Elihue Tittsworth, C. B. C. Hodges, and N. J. Phillips, good and lawful men, citizens and freeholders of the northern division of the eastern district of Tennessee, who, being heretofore duly elected, tried, and sworn to try the issues joined between the parties, upon their oaths do say that they cannot agree; and thereupon, both parties consenting thereto, one of the jurors is withdrawn from the pannel and the rest of the jurors are together excused from rendering a verdict herein.

Be it remembered that at a circuit court of the United States began and held for the northern division of the eastern district of Tennessee, at the Federal court-rooms, in the city of Knoxville, within said district and the sixth circuit, on the second Monday, it being the 13th day, of January, A. D. 1890—present and presiding, the Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee—the following proceedings were had, to wit:

MONDAY MORNING, *January 27th*, 1890.

Court met pursuant to adjournment.

Present and presiding: The Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

W. C. JONES
vs.
EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD COMPANY. } Damage. No. 762.

21 Came again the parties, by attorney, and came also the same jury as was respited on Saturday last, to wit, W. A. Cross, J. W. Cruze, John Marney, Caleb Baker, P. M. Kizer, J. D. Milligan, J. W. Clark, J. R. Bailey, Oliver Broyles, J. R. Kirk, Dennis Trammell, and H. B. Jones, good and lawful men, citizens and fre-holders of the northern division of the eastern district of Tennessee, who, being heretofore duly elected, tried, and sworn to try the issues joined between the parties, upon their oath do say that they find the issues in favor of the plaintiff and against the defendant, and do assess the plaintiff's damage at twelve thousand and five hundred ($12,500) dollars.

It is therefore considered by the court that the plaintiff recover of the defendant the sum of twelve thousand and five hundred dollars, together with the costs of this case, for which let execution issue.

Thereupon the defendant, by attorney, entered a motion for a new trial in this case.

TUESDAY MORNING, *February 20th*, 1890.

Court met pursuant to adjournment.

Present and presiding: The Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

W. C. JONES
vs.
EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD COMPANY. } Damage. No. 762.

The motion heretofore made for a new trial in this case having been argued by counsel and fully considered and understood by the court, the court is pleased to sustain said motion and to order that a new trial be, and the same is hereby, granted, and the verdict of the jury and the judgment of the court heretofore entered in this cause is set aside and for nothing held.

22 Be it remembered that at a circuit court of the United States began and held for the northern division of the eastern district of Tennessee, at the Federal court-rooms, in the city of Knoxville, within said district and the sixth circuit, on the second Monday, it being the 14th day, of July, A. D. 1890—present and presiding, the Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee—the following proceeding were had, to wit:

TUESDAY MORNING, *November 11th*, 1890.

Court met pursuant to adjournment.

Present and presiding: The Honorable Howell E. Jackson, judge

of the United States circuit court for the sixth judicial circuit, and the Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

W. C. JONES
vs.
EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY. } Damage. No. 762.

Came the parties, by attorney, and came also the same jury as was respited on yesterday, to wit, G. W. Johnson, E. E. Shipley, M. K. Benson, S. S. Smith, D. P. Click, S. F. Bean, T. J. Burkhardt, A. C. Broyles, Z. H. Hayworth, J. W. Thompson, H. D. Singleton, and J. B. Cox, good and lawful men, citizens and freeholders of the northern division of the eastern district of Tennessee, who, being heretofore duly elected, tried, and sworn to try the issues joined between the parties, upon their oath do say that they find the issues in favor of the defendant.

It is therefore considered by the court that the defendant go hence and recover from the plaintiff and Charles E. Dosser, his
23 surety for the prosecution of this suit, all the costs of this cause, for which execution is awarded.

TUESDAY MORNING, *December* 23, 1890.

Court met pursuant to adjournment.

Present and presiding: The Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

W. C. JONES
vs.
EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD COMPANY. } Damage. No. 762.

Plaintiff, W. C. Jones, by his attorney, moved the court to grant a new trial of the issues of this suit; which motion, on consideration, was overruled by the court.

And thereupon plaintiff tendered his bill of exceptions to the rulings, charge, and judgment of the court, which, being found correct, was signed, sealed, and ordered to be made a part of the record in this suit.

Bill of Exceptions.

Filed Dec. 23rd, 1890.

In the Circuit Court of the United States for the Eastern District (Northern Division) of Tennessee.

W. C. JONES
vs.
EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD COMPANY.

Be it remembered that upon the trial of this case before the Hon. Howell E. Jackson, circuit judge, and a jury, the following witnesses were examined and evidence offered and proceedings had, to wit:

E. M. THURSTON, being duly sworn, said:

I am the general agent for the Equitable Life Insurance
24 for this district; have been in the insurance business about fifteen years. I have in my hands the American Experience Life table, upon which the leading American life insurance companies make their insurance estimates. It is in general use among them. The average expectation of the life of a man in this country twenty-two years of age is between thirty-nine and forty years.

M. L. CROWLEY, being duly sworn, said:

I formerly lived in Jonesboro'; was raised there; used to run upon the East Tennessee, Virginia & Georgia railroad as route agent; was familiar with the little delivery platform that used to stand between the tracks at the west end of the depot. It was about two or three feet wide and ten or twelve feet long. The side of a car standing or passing by it on the main track would be within twelve or fourteen inches of it.

(Plaintiff offered to prove that before his injury accidents had occurred and persons had been injured at this platform by passing trains, but, on objection of defendant, the same was excluded.)

ZEKE GUGGENHEIM, being duly sworn, said:

I lived at Jonesboro' at the time plaintiff was hurt by passing train and saw the accident. I was then learning telegraphy in the depot office. I was standing that morning just outside the door on the platform at the west end of the depot when Jones came out. I was facing the steps and the railroad track in the direction in which he went talking to Patton, who was leaning against the depot wall facing west. Jones came out walking rapidly and passed by us, turned to the right, walking fast to the head of the steps. He trotted down them and walked fast across the side track to the corner of the depot, and just as he passed the corner, it seemed to me, he sorter flinched or drew back, and just then the cross-beam of the
pilot struck him and knocked him against the delivery plat-
25 form, and then he seemed to fall back against the engine and then under the platform. I did not know the train was coming just then; had not seen or heard anything of it; had not heard a whistle nor bell nor rumbling of the train. Patten and I was talking together when Jones passed. Patten was telling me, and we were laughing about some words that passed between Jones and Mr. Okey, the agent. It was the local freight train that struck Jones. I knew it came about that time of day, but did not hear anything to make me caution him about it. The depot floor was three or four feet above the ground, and they moved the freight in there with trucks, which made a rumbling noise.

Cross-examination:

I live now in Ohio, but my mother lives here. I did not come here especially to testify in this case, but was told by Mr. Desser

that if I would come here I would probably be examined as a witness. After Jones came out of the depot he did not stop before he got to the track. I do not know whether he was running inside of the depot or not. I did not see him till he came outside where I was. He was not running when he passed us, but was walking fast. He was not running when the train struck him, but was walking pretty fast. He had trotted down the steps. There are five or six steps there. You might see through the arch by the side of a freight car, when only one was standing there, if it was near the east end, I guess, but I do not think you could see through either side of the arch near the west end.

Re-examination:

There was a car in there that morning, I think; do not recollect where, which end, nor whether there was one or more.

26 The plaintiff then read the depositions of the following witnesses:

In the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

W. C. JONES)
vs.
EAST TENN., VA. & GA. RAILROAD COMPANY.)

Interrogatories to be Propounded to R. D. Rosenheim, of Wytheville, Virginia, a Witness for Plaintiff, in the above Suit.

1. State your name, age, residence, and occupation.
2. State whether you were present at the hotel or depot in Jonesboro', Tennessee, on the occasion when the plaintiff was injured by being struck by a locomotive.
3. State how the accident occurred, setting out the facts in detail as you saw them, and stating the place — you were at the time, with reference to corner of the depot, when the accident occurred.
4. State as near as you can the speed of the train at the time.
5. State whether your attention was attracted to it by its rapid approach or not and how far it passed beyond the depot before stopping.
6. State whether any signals were given by the locomotive until just at the time it struck plaintiff and whether its approach was noisy or quiet.
7. State anything further you may know in regard to the case that is material or important

INGERSOLL & DOSSER,
Att'ys for Plt.

Cross-interrogatories.

Int. 1. Were you not in the dining-room of the hotel at the time the train passed the hotel?

Int. 2. If you say you were not, were you not in the hotel office?

Int. 3. If you say you were not, were you not on the side porch of the hotel?

Int. 4. Were you on the hotel side or on the depot side of the track?

27 Int. 5. How did you happen to be where you could see the train?

Int. 6. Did you see it when it first rounded the curve near Ross Smith's mill?

Int. 7. Who were you talking to, if anybody?

Int. 8. Did you see Jones coming towards the track? Was he running, trotting, or walking?

Int. 9. Did he stop to look or listen before stepping on the track?

Int. 10. Did you know the train was coming before you saw it? How did yo- know it?

Int. 11. How far was it from you when you first heard it?

Int. 12. How many cars were in the entire train?

Int. 13. How far did the caboose or rear car run beyond the depot?

Int. 14. Do you know what the usual stopping place was?

Int. 15. How fast was train running when you first saw it?

Int. 16. What means had you of telling how fast the train was running when it passed you, and how close to you did it run when passing you?

Int. 17. How far did it run after it passed the northwest corner of the depot?

Int. 18. State whether or not you were laboring under an excitement when the train passed that point or when it passed you.

Int. 19. Had you seen Jones struck or about to be struck when the train passed you or did you form your judgment of its speed while seeing or after having seen the accident?

Int. 20. Do you know within what distance that train, running at the speed you say it was, could have been checked at that point?

Int. 21. Do you know whether the grade of the railroad track at that point, coming west, is up or down? If so, which is it?

Int. 22. Have you had any correspondence with Jones or his attorneys or either of them prior to this date touching your

28 evidence in this case or in relation to giving your deposition in this case? If so, please file any letters received by you and also your answers, if you kept copies of them.

Int. 23. Have you had any communication with any of them prior to this date? If so, what has been the substance of that communication and through whom was it received?

Int. 24. Who has been present at the taking of this deposition? Have you had any assistance from him in making your answers or any suggestions as to any answers you have made to any of the questions propounded? If so, what suggestions and in answer to what questions and who made them to you?

July 2nd, 1884

WM. M. BAXTER,
JOHN ALLISON, Jr.,
Att'gs for Def't

We agree that deposition may be taken upon the foregoing original and cross interrogatories (formal caption of certificate being waived) before any officer authorized to administer an oath.

BAXTER & ALLISON,
Att'ys, &c.

In the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

W. C. JONES
vs.
EAST TENN., VA. & GA. RAILROAD COMPANY.

Answers of R. D. Rosenheim to the Questions Hereto Attached, Propounded by Plaintiff and Defendant, After Being First Duly Sworn.

1st answer to 1st question by plaintiff. Robert D. Rosenhem; age, 27 years; residence, Wytheville, Va.; occupation, travelling salesman.

2nd answer to 2nd question by same. I was west of the
29 depot. I was on the plank walk leading from the crossing to Capt. Sevier's hotel.

3rd answer to 3rd question by same. I was on the platform or plank walk leading to the hotel. The train was running very rapidly, and Mr. Jones stepped out from the brick wall or depot. It seemed to me as he stepped out from the depot the cross-beam of the engine hit him and hurled him against either the platform or pillar of the platform. He then fell back against the engine, and it seemed to knock or push him back under the platform. It was done so quick I could hardly tell how it was done. The train passed me near the crossing. I was west of the corner of the depot when the accident occurred, if I understand the location of the road. After the train passed I walked up to the platform where the gentleman was lying, whom I recognized as W. C. Jones. Two or three gentlemen then carried him across the track and laid him on the plank walk, and he was then examined by two physicians, I think. They then carried him to the porch of Capt. Sevier's hotel and placed him on a lounge. It was thought then for quite awhile that he would die. I don't know exactly how long he remained on that porch, but it was for some hours. From the porch they carried him into a room in the upstairs of Capt. Sevier's hotel. The accident occurred, to the best of my knowledge, on Monday morning, July 16th, 1883. I remained at the hotel until the following Wednesday night, and I visited him in his room frequently during that time and never found him rational. Sometimes he was very uncontrollable. His mind seemed to be affected. I stopped at Jonesboro' on my return, about three weeks afterwards. He was still there and confined to his bed. I passed his room, but did not go in.

4th answer to 4th question by same. Well, it would be right hard for me to tell exactly how fast that train was running. It was

running much faster than a train ought to run into or up to a depot. I should think it was running 17 or 18 miles per hour.

30 5th answer to 5th question by same. I can't say that my attention was attracted by its rapid approach, from the fact that you could not see the train until it got near the depot. I did — see it until it got nearly to the depot. The caboose was at least, I should say, 75 yards beyond the depot when the train stopped. It was a tolerably long train—somewhere in the neighborhood of fifteen cars, I should suppose.

6th answer to 6th question by same. It came in very quietly for — train running as fast as it was. I did not hear any whistle nor ring of the bell before it struck the *def't.* If they rung the bell afterwards I did not hear it.

7th answer to 7th question. I think I have stated about what I know in reference to the matter.

Answers to Cross-interrogatories.

1st answer to 1st question of def't. No, sir.

2nd answer to 2nd question of same. No, sir; I was not in the hotel office.

3rd answer to 3rd question of same. No, sir.

4th answer to 4th question of same. I was on the hotel side.

5th answer to 5th question by same. Well, sir, I was coming up the platform to Capt. Sevier's hotel. I had been over in town and had gotten back on the plank walk near the railroad and jail, which was a few feet from the crossing and probably 50 or 60 feet from the hotel.

6th answer to 6th question of same. No, sir; I did not notice it when it rounded the curve.

7th answer to 7th question by same. I do not think I was talking to anybody. There were a good many persons on the plank walk. I remarked to somebody, That train has killed some one; but I do not know who I made the remark to.

8th answer to 8th question by same. He was walking
31 pretty fast, I think, coming out between the platform and the brick wall that joins the depot. It looked like he stepped right out in front of the train. He could not see the train for that big wall; no one could have seen it from the position he was in.

9th answer to 9th question by same. I don't think he stopped. I did not see him stop. I don't know about his listening.

10th answer to 10th question by same. I never heard the train until I saw it. I was walking along and not thinking about the train. There was a good deal of noise there from wagons crossing the railroad and the mill was running.

11th *question* answer to 11th question by same. I could not say exactly. It was probably 75 yards; maybe that far and maybe a longer or shorter distance.

12th answer to 12th question by same. As I stated before, somewhere about 15, I think.

13th answer to 13th question by same. About 75 yards, I think.

14th answer to 14th question by same. All the trains that I ever saw stop there stopped right in front of Capt. Sevier's hotel. The freight depot is right on the opposite side from the hotel. I have seen them unloading freight there frequently.

15th answer to 15th question by same. About 17 or 18 miles per hour, to the best of my judgment.

16th answer to 16th ques. by same. The only means I had of telling how fast it was running, I ride a great deal on trains and a great deal on freight trains, as I am a travelling man and I have to pick up any train I can get on, and I think that train was running nearly as fast as freight trains usually run from station to station. I was right close to the train when it passed me; only a few feet from it.

17th answer to 17th question by same. It ran about 75 yards, I think.

18th answer to 18th question by same. When it passed by
32 me I was a little excited because it had just struck a man.

19th answer to 19th question by same. I had seen Jones struck before it passed me. I thought the train was running very fast when I first saw it.

20th answer to 20th question by same. I should suppose 100 to 125 yards. I don't know enough about stopping freight trains to speak very definitely. I should suppose it would depend upon the number of brakemen and the number of breaks on the train.

21 answer to 21st question by same. It strikes me it would be a little bit down grade at that point.

22d answer to 22nd question by same. I have never had any communication with Jones by letter and no correspondence with his attorneys.

23rd answer to 23rd ques. by same. The only communication which I have had with them was this: On Nov. last I was in Jonesboro'. Mr. Chas. Dosser sent for me to come to his office. He asked me if I had seen the train strike Mr. Jones. I told him I did. He asked me how fast I thought the train was running. I told him 17 or 18 miles per hour. He asked me no more questions, but said he would have me summoned in the case. Then, in June last, I was in Jonesboro' and met Messrs. Dosser & Ingersoll. They asked me where I would be in the month of July. I told them I supposed I would be on the road somewhere. Mr. Ingersoll asked me about the same questions Mr. Dosser had. He said he thought I would be a very important witness and he would have me summoned to Knoxville or have my deposition taken.

24th answer to 24th ques. by same. No one has been present except the officer taking the deposition, and I have had no assistance in forming my answers.

And further deponent saith not.

R. D. ROSENHEM.

33 STATE OF VIRGINIA, } *To wit:*
Wythe County, }

I, C. B. Thomas, a notary public in and for said county and State, do certify that the foregoing answer to interrogatories were given before me by R. D. Rosenheim after he had first been duly sworn.

Given under my hand and notarial seal this 16th of July, 1884.

[SEAL.] CHAS. B. THOMAS.

Fee for taking deposition..... .... $2 50; charged to plaintiff.
Postage..... 50

$3 00

Endorsed: Deposition of Rosenheim. Jones *vs.* Railroad. Received, sealed up, from the post office and filed by me this July 17th, 1884.

A. R. HUMES, *Clerk.*

34 In the Circuit Court (U. S.) for Northern Division of Eastern District of Tennessee.

W. C. JONES }
vs.
EAST TENN., VA. & GA. RAILROAD CO. }

In the above case it is hereby agreed that the deposition of Wm. M. Fleming, of Jonesboro', Tenn., may be taken as a witness for plaintiffs at the office of Chas. E. Dosser, Esq., in Jonesboro', Tenn., on Monday, July 14th, 1884, on the oral examination of counsel on both sides, and that when taken it may be read on the trial of this case as evidence.

JOHN ALLISON,
Att'y for Def't.
CHAS. E. DOSSER,
Att'y for Pl'ffs.

In the U. S. Court, at Knoxville, Tenn.

W. C. JONES }
vs.
EAST TENN., VA. & GA. R. R. CO. }

Deposition of William M. Fleming, witness for plaintiff in the above-named case, taken before E. A. Shipley, clerk of county court of Washington Co., Tenn., by consent of counsel for plaintiff and defendant, on the 14th day of July, 1884, at the office of Chas. E. Dosser, in Jonesboro', Tenn., in the presence of said Chas. E. Dosser, attorney for plaintiff, and John Allison, attorney for defendant.

Said witness, WM. M. FLEMING, of lawful age, being duly sworn, deposed as follows:

I will be 73 years of age in October next, 1884. I reside in Jonesboro', Tenn., six feet south of the East Tenn., Va. & Ga. R. R. track

and west of the station about 200 yards. I was acquainted with Dr. W. C. Jones and remember the fact that he was injured by a
35 train of def't's some time during the summer of 1883. I was sitting on my back porch, which is about 7 feet from the railroad track. I had a fair view of the station and track from where I was sitting. I saw a freight train coming from the east. I saw it first coming around the curve near where Jones was struck, but I did not see it hit Jones. It was a tolerably short train, probably some eight or nine cars. The train was coming in pretty fast. It is between six and seven hundred feet from the depot to the front of the engine where it stopped. I first thought that it was a through freight not intending to stop until I saw a brakeman waving to the engineer to stop. I am satisfied that the train was running at least the rate of ten miles per hour when it passed the depot. I cannot say that it was runing as fast as twelve miles per hour. I do not pretend to be a judge of the speed of running trains. I have lived where I do now ever since the railroad was built. The side track at Jonesboro' runs through the depot. There was a car on the side track inside of the depot at the time the accident occurred. Coming out of the depot to cross to the platform on the north side of the tracks, a box car being on the side track in the depot as the one was at the time of the accident, you could not see a train coming in from the east. I think the car being on the side track would obstruct the sound of the train from being heard to some extent at the depot coming in from the east; and further sayeth not.

W. M. FLEMING.

We agree to waive formal certificate to this deposition.

JOHN ALLISON,
Att'y for Def't.
CHAS. E. DOSSER,
Att'y for Plaintiff.

The above deposition of William M. Fleming was taken before me, as stated in the caption, on this July 14, 1884.

E. A. SHIPLEY,
County Court Clerk.

[Seal of the C't C't.]

36 Endorsed: Deposition of William M. Fleming. W. C. Jones *vs.* E. T., Va. & Ga. R. R. Co. In the United States circuit court at Knoxville, Tenn. E. A. Shipley, cl'k. Fee taking deposition Wm. M. Fleming and witness 1 day to be taxed in bill of cost on termination of this suit. Postage to E. A. S. 4c. Filed June 15, 1884. A. R. Humes, U. S. cir. c't cl'k.

In the Circuit Court (U. S.) for the Northern Division of the Eastern District of Tennessee.

W. C. JONES
vs.
EAST TENN., VA. & GA. RAILROAD COMPANY.

In the above case it is hereby agreed that the deposition of Capt. James Sevier, of Jonesboro', Tenn., may be taken as a witness for plaintiff at the Washington hotel, in Jonesboro', Tenn., on Saturday, July 5th, 1884, on the oral examination of counsel on both sides, and that when taken it may be read on the trial of this case as evidence.

WM. M. BAXTER,
Att'y for Def't.
H. H. INGERSOLL,
Att'y for Pl'ff.

The time and place above mentioned for taking the deposition of Capt. James Sevier is by agreement of counsel changed so as to make the time July 14th, 1884, and the place the residence of Chas. E. Dosser, in Washington county, Tenn.

JOHN ALLISON,
Att'y for Def't.
CHAS. E. DOSSER,
Att'y for Pl'ff.

In the Circuit Court (U. S.) for Northern Division of Eastern District of Tennessee.

W. C. JONES
vs.
EAST TENN., VA. & GA. RAILROAD CO.

Deposition of James Sevier, witness for plaintiff in the above-named cause, taken before me, E. A. Shipley, county court clerk
37 of Washington Co., Tenn., by consent, on the 14th day of July, 1884, at the residence of Chas. E. Dosser, in Washington Co., Tennessee, in the presence of said Charles E. Dosser, attorney for the plaintiff, and Jno. Allison, attorney for defendant.

Said witness, JAMES SEVIER, of lawful age, being duly sworn, deposes and says:

I am about 70 years of age. I was acquainted with Dr. W. C. Jones. I recollect the fact that he was injured by being struck by the engine of a freight train on the East Tenn., Va. & Ga. R'road during the summer of 1883. At the time of the accident I was sitting in the office of the Washington hotel, Jonesboro', Tenn. I was about twelve feet from the railroad track. I saw the train that injured Dr. Jones. It was a local freight train coming from the east. It was running very fast when it passed the depot. It was

running a great deal faster than the local freight usually runs in coming into the station. I have no idea as to what rate the train was running. I think it was running as fast as I ever saw a freight train run. The train did not stop that morning at its usual stopping place, but ran down beyond the depot. The caboose stopped about 200 feet or more west of the depot. I think it was a short train. This is my impression. Dr. Jones was first carried out on the platform, where he remained a short time, from thence into the porch at the hotel, after which he was carried to his room in the hotel on a lounge or cot, and was confined to his bed one month or more. After this his wife and a Mr. Palmer started with him to their house in Michigan. We was weak both mentally and physically when he left. I was proprietor of the Washington hotel at the time. I do not think Dr. Jones was of sound mind when he left Jonesboro', and further sayeth not.

JAS. SEVIER.

We agree to waive formal certificate to the foregoing deposition.

JOHN ALLISON,
Att'y for Def't.

38 CHAS. E. DOSSER,
Att'y for Pl'tff.

The above deposition of James Sevier was taken before me, as stated in the caption, on this 14th July, 1884.

[Seal of County C't.]

E. A. SHIPLEY,
County Court Clerk.

Endorsed: Deposition of Capt. James Sevier. W. C. Jones *vs.* E. T., Va. & Ga. R. R. Co. In the United States circuit court, at Knoxville, Tenn. E. A. Shipley, clerk. Taking deposition James Sevier and witness one day to be taxed in bill of costs on termination of this suit. Postage to E. A. S., 4c. Filed Jan. 15, 1884. A. R. Humes, cl'k U. S. cir. c't.

In the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

W. C. JONES
vs.
EAST TENN., VA. & GA. RAILROAD COMPANY.

Interrogatories to be Propounded to Anson Bartholomew of Blissfield, Michigan, a Witness for Plaintiff in the Above Case.

1. State your name, age, residence, and occupation.
2. Are you acquainted with the plaintiff? If so, how long have you known him and what is his age, residence, and occupation?
3. Is he now pursuing his usual business? If not, why not?
4. If you have ever made any examination of plaintiff to ascertain his physical and mental condition you may state when, where,

and how often, and whether in consequence you became familiar with the same.

5. State fully and at length all you may know in regard to the same, detailing the extent of his injuries, their character, and effect upon his health, whether temporary or permanent; also their effect upon his mind, whether they have in any degree disqualified him for his business; and, if so, to what extent; whether they have affected his mind so as to disturb in any way his domestic relations; and, if so, to what extent. State all you may know in re-
39 gard to the effect of his injuries fully an- in detail.

6. State, if you know, the present condition and state of plaintiff's health and whether or not he is recovering, and anything further you may know in regard to this case that is material to either party.

INGERSOLL & DOSSER,
Att'ys for Pl'tff.

N. B.—Repeat same questions to Dr. Palmer, of the same place, witness for pl't also.

I. & D.

Cross-interrogatories.

Int. 1. Are you a physician?

Int. 2. Are you not or were you not Jones' partner at the time he is alleged to have been injured?

Int. 3. Do you know whether Jones' condition is simulated or real? How do you know it?

Int. 4. Were you present when Jones was hurt?

Int. 5. If you are not a physician, how can you undertake to state what effect Jones' injuries have produced upon his mind and body, and whether the same are permanent or otherwise, or whether he is recovering or not?

Int. 6. Did you ever make an examination—Jones, before he was hurt, to ascertain his condition, mental and physical—before he was hurt? Do you know anything of his predisposition to mental derangement?

WM. M. BAXTER,
JOHN ALLISON, JR.,
Att'ys for Def't.

Same cross-interrogatories to be propounded to Dr. Palmer, except numbers 2 & 5.

We agree that deposition may be taken upon the foregoing original and cross-interrogatories (formal caption and certificate being waived) before any officer authorized to administer an oath.

BAXTER & ALLISON, *Att'ys, &c.*

In the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

W. C. JONES)
vs.
EAST TENN., VA. & GA. RAILROAD COMPANY.)

Deposition of Anson C. Bartholomew and William J. Palmer, of Blissfield, in the county of Lenawee and State of Michigan, witnesses produced, sworn, and examined on the 17th day of July, A. D. 1884, at Adrian, in said county, by virtue of the annexed stipulation.

ANSON BURLINGAME, a witness produced, sworn, and examined on the part of the plaintiff, by virtue of and in pursuance of the annexed stipulation, upon the interrogatories and cross-interrogatories being a part of said stipulation, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth in relation to the matters in difference between the parties, answering, deposes and says:

1st. To the first interrogatory. My name is Anson C. Bartholomew. I am forty-six years old. I reside in the village of Blissfield, in the county of Lenawee and State of Michigan, and am in the mercantile business; now in the furniture business, formerly in the drug business.

2. To the 2nd interrogatory. I am acquainted with the plaintiff and have been for three years last past, or about that; his age is about twenty-three (23) years; he resides, as deponent understands, in Randolph, in the State of New York, since his injury; his occupation is that of a physician; prior to his injury he was a resident of Blissfield.

3. To the third interrogatory. I understand he is not and think he is no pursuing his usual business in consequence of injuries received by him on the defendant's railway. I was not present when he was injured, but understand that he was struck by a passing train.

4th. To the fourth interrogatory. I never made any examination of plaintiff, as inquired of in this interrogatory, as I understand the question. I am not a physician and have never examined
41 him as such. I took care of and helped to take care of him for about one month immediately succeeding his injury. I saw him again for a few days in March last, and then not again until this afternoon.

5. To the 5th interrogatory. I knew him for about two years before his injury; he was a successful physician at Blissfield; was intelligent, well educated, had an unusually good memory, and was remarkably strong for a man of his size. I got word of his injury by a telegram; went to him at once at Jonesboro', Tennessee; found him unconscious; think he remained so most of time for two weeks; gradually improved, and in about four weeks from injury had so far recovered that it was thought he might be sent home, and he

did so in company with his wife and a Mr. Palmer, to Blissfield, Michigan.

During the time before he left for home he was very nervous; talked almost continually; would repeat the same things over and over; would tell things that he undoubtedly thought was true when in fact there would not be a word of truth in it. As an instance, he told about playing cards with my wife, when in fact he never played cards in his life. He would contradict his wife nearly every time she made any remark. He took or seemed to take special pains to provoke his wife; she could do nothing to please him—things which he was never known to do before his injury. He would relate things of no importance time and again—trifling things; would speak of them as though they were of great importance.

In March last he came to Blissfield and remained there four or five days and remained at the house were I was boarding.

He had improved very much since I last saw him, when he left Jonesborough for home the August before. He was still nervous, and I noticed he did not recall names of persons or things that he had been familiar with before his injury. He would have
42 dizzy spells; they would come upon him suddenly; his eyes would look dim and his face would flush; the spells would last, perhaps, for twenty minutes, and then he would feel usually well again.

His condition was such that people would not employ him as a physician, in my opinion, although he seemed to want to go to work again. As I understood it he had been sent to his father's, at Randolph, the fall before on account of his supposed insanity. He had threatened to shoot his wife, and the family were afraid of him and were alarmed when they heard he was coming back. I observed him the more closely from knowing these things and from having known him well before his injury. I did not see him again until this afternoon, as before stated.

6. To the 6th interrogatory. I notice that his eyes, especially his left eye, looks bloodshot; seems more nervous than in March last; does not appear as strong as he did then; is more languid; not as quick in his walk and movements; otherwise I see no difference in his condition. Before his injury he was quick and active. From his apparent condition and from what I have seen of him this afternoon, I would not dare to employ him as a physician without watching him and knowing more of him. His wife has not lived with him since he went to Randolph last fall, except as he was here in March last; as I understood it, it is in consequence of the mental condition in which said injury has left him and the fear of recurring insanity. She did not lodge with him in March last when he was in Blissfield.

His wife and my wife are sisters, and I have had ample opportunity to know of the things about which I have testied.

ANSON C. BARTHOLOMEW.

Subscribed to & sworn before me this 17th day of July, 1884.

CLEMENT E. WEAVER,
Notary Public for said County.

43 In answer to the cross-interrogatories witness says:

1. To the first cross-interrogatory. I am not a physician.

2. To the 2nd cross-interrogatory. We were partners in a fruit-drying business in Tennessee; were partners in no other occupation or business.

3. To the 3rd cross-interrogatory. My judgment is that his present condition and his past condition, such as I have described it to be, is and has been real and not simulated; I know it from an intimate acquaintance with him before and since his injury.

4. To the 4th cross-interrogatory. I was not.

To the 5th cross-interrogatory. I have not said and cannot say whether his injuries are permanent. I am not a physician, but from my knowledge of him before and since his injuries I am able to state the facts and conclusions already given in evidence. From my relationship to him and my interest in his welfare I was led when I saw him in March last to observe him closely, and my judgment was that he had not recovered from his injuries, and that he was in his then condition not competent to resume the practice of his profession.

6. To the 6th cross-interrogatory. No; I had no occasion to make any such examination. I know of no predisposition to mental derangement.

ANSON C. BARTHOLOMEW.

Taken, subscribed, and sworn to before me this 17th day of July, A. D. 1884.

CLEMENT E. WEAVER,
Notary Public in & for said County of Lenawee.

WILLIAM J. PALMER, a witness produced, sworn, and examined on the part of the plaintiff in the above-entitled cause, being by me first duly sworn in manner and form aforesaid, deposes and says in answer to the said several interrogatories:

To the 1st interrogatory. My name is William J. Palmer; my age is forty-two years; I reside at Blissfield aforesaid, and my
44 occupation an undertaker; prior to last fall my business was general mechanical business.

2. To the 2nd interrogatory. I have known the plaintiff about two years; his age is about twenty-three, I should judge by his looks; don't know of my own knowledge; his residence when I first knew him was in Blissfield; he last fall went to Randolph, in the State of New York; his occupation in Blissfield was that of a physician.

3. To the 3rd interrogatory. He is not, to my knowledge or belief, practicing his profession; as I understand it, the rumor is that he is incapacitated from so doing by an injury received on the de-

fendant's railroad. I was not present when he was hurt, but some time the third day after he was hurt.

4th. To the 4th interrogatory. I never made any examination of him as a physician, for I am not one. I saw him on the third day after his injury, and was with him from that time continually (took the principal care of him) while he was in Jonesborough. We received the word that he was injured, and started at once from Blissfield to go to him—Bartholomew, his wife, Jones' wife, and myself—and arrived at Jonesborough on the 3rd day. We stayed with him nearly four weeks after he was hurt, when Mrs. Jones and myself came home with him to Blissfield.

5th. To the 5th interrogatory. His injuries seemed to be mostly in the head. He was not conscious for more than a moment or two at a time for a couple of weeks after he got hurt; then there seemed to be a reaction, and we thought he was dying. He ral-ied, and from that on he seemed to improve slowly. He did not seem to get his mind; was what I call insane; much so by spells; was a good deal so all the way home; was jealous of his wife—a thing entirely unnatural to him; some of the time would not ride in the same car with her. He talked about things that were entirely foreign to his usual habits and disposition. His mind seemed to run upon his escapades with girls and women—things that I never heard him mention before and a subject I never heard him talk upon, all of which I am sure he would not have said or done if he had been right. At times he would seem to be all right, but only for a short time. His condition, talk, and actions impressed me as being a hopeless prospect. On our arrival at Blissfield he was no better, and I thought he was worse. Within two or three days we took him to Detroit; first to Ann Arbor, and, not finding the physician, went on to Detroit, where he was examined by Dr. Gilchrist. We brought him home, but his condition was such that the family did not feel safe to have him remain. While he remained in Blissfield at this time they remained in her father's family, where they had been since their marriage. While at Jonesborough, after he regained consciousness, while on the way home and after getting home, he talked a great deal against his wife. Before his injury he seemed to think everything of her and everything was pleasant. After he had been home a few days the family, feeling unsafe, sent him to his own father's, in Randolph. I did not see him again until his return to Blissfield last March. I did not then see him a great deal, but thought his condition was but little improved. I was pretty well acquainted with him before he was hurt—lived next door to him. I then considered him a bright, smart, intelligent, and active young man; was gaining quite a fair *representation* as a physician, for a young man. Since March last I have not seen him until today. In my opinion I don't think he is any better than he was last March. I have observed him today very carefully. I really have no hopes of his being much, if any, better. I think his head is out of shape; all his actions and talk are not as before he was hurt. He is in no condition, in my judgment, to attempt to resume his practice.

6. To the 6th interrogatory. I do not know that I can add anything to what I have already said.

WM. J. PALMER.

Taken, subscribed, and sworn to before me this 17 day of July, 1884.

CLEMENT E. WEAVER,
Notary Public for Lenawee County.

46 In answer to cross-interrogatories witness says:

1. To the 1st cross-interrogatory. I am not a physician.

3. To the 3rd cross-interrogatory. I think the condition of Jones, as I have described it, is real and not simulated. I judge so from my former knowledge of him and from my close observation of him since, as stated in my direct examination.

4. To the 4th cross-interrogatory. I was not present when he was hurt.

5. To the 5th cross-interrogatory. I cannot tell as a physician would tell, but I can tell what my observation and experience teaches me. I have stated it just as it impressed me, from the beginning to the end, and the conclusions I have come to from time to time are based upon my intimate knowledge of the facts detailed by me on direct examination.

7. To the 6th cross-interrogatory. I never before his injuries made any examination of Jones to ascertain his mental or physical condition. I knew him, as before stated. I know nothing of any predisposition to mental derangement.

WM. J. PALMER.

Taken, subscribed, & sworn to before me this 17 day of July, A. D. 1884.

CLEMENT E. WEAVER,
Notary Public in & for said County of Lenawee.

STATE OF MICHIGAN, } ss:
Lenawee County, }

On the 17th day of July, A. D. 1884, at the city of Adrian, in said county, personally appeared before me, Clement E. Weaver, a notary public in and for said county, duly authorized to administer oaths, Anson C. Bartholomew and William J. Palmer, the witnesses above named, and after having taken the oath prescribed by law, which oath was administered to and taken by each of said witnesses with uplifted hand to tell the truth, the whole truth, and nothing
47 but the truth, the depositions were thereupon reduced to writing by me as given by each of the said witnesses, and the whole then read over to each witness respectively, who thereupon declared the same to be the truth, the whole truth, and nothing but the truth, and in my presence subscribed his name thereto.

In witness whereof I have hereunto set my hand this 17th day of July, A. D. 1884.

CLEMENT E. WEAVER,
Notary Public in & for Lenawee County, Michigan.

STATE OF MICHIGAN, } ss:
County of Lenawee, }

I, Thomas M. Hunter, clerk of the said county of Lenawee and of the circuit court therein, being a court of record, having a seal, do hereby certify that Clement E. Weaver, Esq., whose name is subscribed to the annexed affidavit and therein written, was at the time of taking such affidavit a notary public in and for said county, duly commissioned and qualified and duly authorized by law to take the same, and, further, that I am well acquainted with the handwriting of such notary public and verily believe that the signature to the said affidavit is genuine and as such entitled to full faith and credit.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at Adrian, this 17th day of July, A. D. 1884.

THOMAS M. HUNTER, *Clerk,*
[SEAL OF CT.] By J. C. HUNTER, JR., *Deputy Clerk.*

Endorsed: Deposition of Bartholomew & Palmer. Jones *vs.* Railroad. Received, sealed up, from the post office and filed by me this July 21, 1884. A. R. Humes, clerk.

48 In the Circuit Court (U. S.) for the Northern Division of the Eastern District of Tennessee.

W. C. JONES }
vs.
THE EAST TENN., VA. & GA. RAILROAD CO. }

Interrogatories to be Propounded to J. G. Gilchrist, Detroit, Mich., as a Witness for Plaintiff in the Abaco Case.

1. State your name, age, residence, and occupation.

2. Are you acquainted with the plaintiff and have you ever professionally examined him since his accident at Jonesboro', Tennessee, to ascertain his condition, physical and mental; if so, when and where?

3. State whether you found him in a sound or abnormal condition, and, if abnormal, all the symptoms you observed indicating disease; what injuries you observed, their extent and effect, whether temporary or permanent; give fully your diagnosis and prognosis of the case at the date you made the examination.

4. State anything further you may know pertinent to this case (which is an action for the injury of which he complains) which may be material to either party therein.

INGERSOLL & DOSSER,
Att'ys for Plaintiff.

Cross-interrogatories.

Int. 1. Do you know anything as to how Jones happened to get hurt?

Int. 2. Did you ever examine Mr. Jones before he claims to be

hurt? Do you know anything of his physical condition to that time or what change there has been, if any, before and since the alleged injury?

Int. 3. Is Jones indebted to you for said examination and opinion?

WM. M. BAXTER,
JOHN ALLISON, JR.,
Att'ys for Def't.

We agree that the deposition may be taken upon the foregoing original interrogatories and cross-interrogatories (formal caption and certificate being waived) before any officer authorized to administer an oath.

BAXTER & ALLISON, *Att'ys, &c.*

49 In the Circuit Court (U. S.) for the Northern Division of the Eastern District of Tennessee.

W. C. JONES
vs.
EAST TENN., VA. & GA. RAILROAD CO.

Deposition of J. G. Gilchrist, of Detroit, Michigan, a witness produced, sworn, and examined by me, a notary public, residing in said city of Detroit, on the 17th day of July, 1884, said witness being examined by me by virtue of the annexed stipulation.

Having publicly administered to said witness an oath that the answers which should be given by him to the interrogatories proposed to him and annexed to said stipulation should be the truth, the whole truth, and nothing but the truth, I proceeded to the examination of said witness, who testified as follows:

First. To the first interrogatory he says: My name is James G. Gilchrist. I am forty-three years old. I reside at No. 66 Howard street, Detroit, Michigan. I am a physician and surgeon of twenty-two years' active practice. I am now and for the last four years have been professor of surgery in the State University of Iowa. Prior to that was three years professor of surgery in the State University of Michigan.

Second. To the second interrogatory he says: I know the plaintiff and examined him professionally on the 23rd day of August, 1883, at Detroit, Michigan.

Third. To the third interrogatory he says: I found him in an abnormal condition, exhibiting a number of injuries. There was a mark of the wound on the left side of the face and a fracture of the cheek-bone. There was some numbness or paresis of the skin on the left side of the face, with swelling about the left eye, with redness and lacrymation. There was also a disturbance of vision. These were the external marks of injury. As indicating some brain lesion, there was some muscular inability of the right arm and hand and an occasional attack of pain in the right knee.

50 On turning the head to the left, lying on the left side or striking the left side of the head, there was vertigo without

nausea. On turning quickly to the left he falls with a feeling as if a heavy weight were pulling him down on that side.

He also had forgetfulness of words and loss of memory generally, all of which locate the injury in the left anterior cerebral lobe.

From the above my diagnosis is that there is a laceration of that portion of the brain mentioned above, the effect of which will probably be to produce paralysis either of the right side of the body or general paralysis or insanity in some form on account of alteration in the structure of the brain caused by laceration; or, if the laceration is slight, practical recovery after an indefinite time. It is not possible to say whether that laceration is slight or otherwise.

The disturbance of vision mentioned above may result in permanent hypermetropia.

Since my first examination of the plaintiff I have seen him a number of times, the last time being yesterday, July 16th, 1884. Although the external marks of injury have become gradually effaced, the indications of brain lesion remain the same. The probabilities in the case, from present appearances, are that memory and speech will always be more or less impaired. His present condition shows a subsidence of active morbid action, but gives cause to fear that strong mental excitement, unusual physical exertion, or some bodily injury may give rise to some acute cerebral trouble threatening his life—such as ab-cess or mania.

Fourth. To the fourth interrogatory he says: I know of nothing further material to either party pertinent to this case.

51 *Cross-interrogatories.*

First. To the first cross-interrogatory he says: I do not know how Jones got hurt.

Second. To the second cross-interrogatory he says: I never examined Jone- before he was hurt. He was a student in the college in which I was a professor, and had the reputation of being very bright and of much more than ordinary abilities.

Third. To the third interrogatory he says: Jones is not indebted to me for my examination or opinion.

JAS. G. GILCHRIST, M. D.

Subscribed and sworn to before me this 17th day of July, A. D. 1884.

SANDS F. MOORE,
Notary Public, Wayne County, Michigan.

STATE OF MICHIGAN, } *ss:*
County of Wayne, }

I, Sands F. Moore, a notary public in and for the county of Wayne, State of Michigan, do hereby certify that James G. Gilchrist, named in the foregoing deposition, personally appeared before me on the 17th day of July, A. D. 1884, at ten o'clock same day, and, being by me first sworn to testify the truth, the whole truth, and nothing but the truth to the interrogatories and cross-interrogatories which should be put to him and which are hereto annexed,

did testify as set forth in the foregoing deposition; that the said deposition was wholly written by me and was carefully read by me to the said James G. Gilchrist and was then subscribed and sworn to by said James G. Gilchrist before me.

Said deposition was taken by me pursuant to the stipulation which is hereto annexed.

SANDS F. MOORE,
Notary Public in and for the County of Wayne, State of Michigan.

52 *No. 1. Notarial Certificate.*

STATE OF MICHIGAN, } ss:
County of Wayne, }

I, John J. Enright, clerk of said county and clerk of the circuit court for the county of Wayne, which is a court of record having a seal, do hereby certify that Sands F. Moore, whose name is subscribed to the jurat of the annexed instrument and therein written, was at the time of taking such jurat a notary public in and for said county, duly commissioned and qualified and duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary public and verily believe that the signature to the said jurat is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said court and county, at Detroit, this seventeenth day of July, A. D. 1884.

JOHN J. ENRIGHT, *Clerk*,
[SEAL.] By WILLIAM P. LANE,
Deputy Clerk.

Endorsed: Deposition of Dr. Gilchrist. Jones *vs.* Railroad. Received, sealed up, from the post office and filed by me this July 19, 1884. A. R. Humes, clerk.

CHARLES E. DOSSER, being duly sworn, deposed as follows:

I reside at Jonesboro'. I am familiar with the status of the depot there. I assisted in making that plat—one already offered. It is a correct representation of the place where Dr. Jones was injured. (Witness here describes the plat to the jury.) The cylinder and cross-beams of the locomotive extend out about the same distance, out to the end of the cross-ties. The noise of a mill there and the coming of a train are very much alike. There was a lumber and stave yard here (indicating) between the depot and the Masonic
53 hall and warehouse at that time. They were stacked up about 20 feet high. The Masonic hall is situated here, opposite the mill. The platform of the hall extends within a few inches of the side track. The first point at which you can see a train coming from the east is 199 feet from the west corner of the depot; you could then see the head block or cylinder. When a freight car was in the depot there on the side track you couldn't see a train coming by

looking through there; the car obstructs the view. The passenger platform of def't is just opposite the depot and on the side next to the court-house and town, on a level with the track. The only access to the office which is in the depot was from the passenger platform, across the tracks, just at the west end of the depot, between it and a narrow delivery platform which then stood between the tracks. It was about three or four feet wide and 15 feet long. An engine or car on the main track would pass within about 14 or 15 inches of this platform, and also within the same distance of the depot wall at the corner where plaintiff was hurt. Going out from the depot to the passenger platform one cannot see a train approaching from the east until it gets past this corner; the first step out from behind it puts him where the train will strike him.

(It is agreed by counsel that the plat furnished by this witness is in substance the same as that offered by Waring, witness for defendant, and hereafter made part of this bill of exceptions.)

There is an arch through there. These abutments in here come within 8 or 10 inches of ordinary freight cars standing on that track there. If the track was straight through the depot you would have eight inches' view between this wall and the car; but the track curves, and with a car in there you have the faintest glimmer of light. The train coming west couldn't be seen until you got to the corner of the depot. The locomotive and cars pass within 14 inches of this corner. I measured the distance while car was standing there.

54 This is a solid brick wall 100 feet long. It is a two-story depot. I was at the time of the accident standing in front door of the hotel. Jonesboro' was then an incorporated town. I didn't see Jones before he got hurt. I saw the train, a freight, approaching from the east. My attention was called to it when it was above the mill, where it turns the curve, where you can first see it; I suppose 150 yards above the mill. My attention was called to it by reason of its rapidity, and I noticed it from the time I first saw it till it passed the depot. After it passed I saw a man lying by the side of the track; lying at the western end of the platform, a little under it. I ran to where he was and recognized the man and returned to the hotel and called Dr. Park. That platform might be called the delivery platform. I don't know at what rate of speed the train was coming. It was coming in at a very unusual rate of speed, and it was the speed of the train that attracted my attention. Approximately my estimate of the speed at that time was in the neighborhood of 17 miles an hour. I made a close examination. I am familiar with the running of trains. I live on the railroad. I didn't hear any signals given at all, either bell or whistle. On the west side of the depot between the door entering into the depot and the point where Jones was struck, I have been there frequently, nearly every day, but I can't say that my attention had been called to the difficulty of hearing a train approaching from the east before accident. After the accident occurred I have stood on the west side of the depot when I knew a train was coming from the east and I

could hear the train coming, but I couldn't tell whether the train was near or far. When I first saw Jones where I have stated I saw his face distinctly; his eyes seemed to be thrown somewhat to one side. I went and got Dr. Park. I didn't go back for 2 or 3 hours afterwards. I didn't want to see him. I saw him next at the hotel. His face was then very much cut up and bruised and his eyes were set to one
55 side, as I would express it. He was unconscious, and I think he remained so about three weeks. His leg was injured somewhere. I don't know to what extent. He remained about a month at Jonesboro'. I think he got out of his bed a week before he left. After he regained consciousness he seemed to be in a dazed condition. What I noticed then was his nonsensical talk; his talking about unimportant things and the want of connection in his idea. I would speak to him when I would meet him, and he would address me very sensibly; but if you would talk to him for any length of time he would rattle on, talking almost incessantly about immaterial matters.

I knew him before he was hurt. I have seen him since I came to Knoxville—met him for the first time since yesterday evening. His condition is very much improved, but still he isn't the Dr. Jones that he was before the accident. I have observed that he is exceedingly nervous and very weak, and he hasn't the use of one of his legs—uses one foot before the other when walking on stairs. He doesn't step like a well man.

The caboose passed some 15 or 20 feet below the crossing west of the hotel. The usual stopping point would be east of the depot. It went below the usual stopping place 150 yards, I suppose.

Cross-examination:

I don't know whether or not the train was on schedule time. Well, I suppose it must have been the noise of the train that first caused me to look in that direction. I saw the engine at the curve when I looked up, at the earliest moment it could have been seen. After I saw the train I noticed only its speed. I heard no bell nor signal for station or for brakes. I don't say that they wer'n't given. I didn't hear any.

56 Dr. J. P. PARK, being duly sworn, said:

I was at Jonesboro' when Dr. Jones got hurt. I was in the dining-room of the hotel when train came up, on the upper side with reference to the grist-mill. I could see an approaching train from where I was; I suppose a 125 or 150 yards up. I was at the window, about the middle of the dining-room. I heard the train whistle and looked out the window and saw it coming along about here. There is a warehouse about opposite the grist-mill. About at the upper end of that I saw the train. That was where I heard the whistle, a call for brakes, I suppose. I heard the bell ring after it passed the window. I didn't hear any bell before. The train was about 140 or 150 yards off when I saw it first. That was the way-freight train. My attention was called to the speed of the train. I

took out my watch and counted and timed the revolutions of the wheel. The drive-wheel made 90 revolutions to a minute. I counted 15 revolutions in 10 seconds. That makes the speed 14.72 miles per h'r. I measured the diameter of those big wheels. It is 55 inches. I paid no attention to the signal after they passed the hotel. They frequently whistle and ring when passing. I was waiting for my breakfast at the time. Some through trains run by there pretty fast. Local trains are generally slow. My attention was called to speed by reason of the fact that we were in the habit of guessing at the rate of speed, and the party who missed had to treat to the cigars. I didn't know whether a railroad man would consider that very fast or very slow running. I was summoned out to Dr. Jones' assistance. The engine at the rate of speed given would go 22 feet in a second. It was making three revolutions in two seconds, and its circumference was 14 feet. I found Dr. Jones in the condition that a man is in after he has received a very severe blow or shock. He was injured on the head and on the hip and thigh and on the back. He had a bruise on the right side of the head, on top, that had broken the scalp a considerable distance, 2 or 3 inches. He had a cut right
57 over the eye and a bruise on the cheek. He had a considerable cut on the thigh, and a bruise on the hip and a bruise on the back, below the right shoulder-blade, and some minor bruises that didn't amount to much. The injuries were severe, that to the head especially; it indicated a very severe blow. He was perfectly senseless and remained so for 16 days. I treated him during that time and for 15 or 20 days longer. I omitted to state one thing, that the stomach was injured. He threw up a great quantity of blood, showing some injury to the lining of the stomach. That was the worst aspect of the case, and his lying in a senseless condition was the next severe feature of the case. It lasted about 16 days, and he required constant attention during that time, and had it. He stayed at Jonesboro' about 31 days. He had several nurses, including his family; there was Mr. & Mrs. Bartholomew, Mrs. Pomeroy, & others. One nurse was necessary all the time. Nurses generally had from 1.00 to 2.50 a day and their expenses. I don't know what arrangement he had with his nurses. He got good nursing. I was well satisfied. I would have been willing to pay $2.50 for it. I paid one nurse $1.00 a day until the family came. I treated him until he went away. There was evidences of returning consciousness on the 16th day. His mind was not clear till the 21st day, and remained in an intelligent condition all the time. My memorandum of the remaining ten days is, "recollection fair." I cannot say whether his injuries are permanent or not. I don't think he has fully recovered. I would have to know his condition for the last year before I could form an opinion as to the permanency of his injuries. I haven't seen him for nearly a year. I have talked with him some since he has been here. Dr. Gibson assisted me. He told me his bill would be $50.00; my bill was $750.00. There was a car in the archway of the depot, at the lower end of the side track. I stood at the window

till the engine passed, and then I turned around. I remem-
58 ber making the estimate in my mind, and I came to the conclusion that it was 90 to the minute, and it was then I heard the bell—after it passed there a second or two. I have seen Dr. J. Jones on three occasions since—the times of the former trials of this case—once in July, 1884, again in July, 1889, and again last winter, at which time I made some examinations and had some talk with him to learn his condition both of mind and body. He is still suffering from the injury. His head is out of shape, being larger on one side than the other, and his mind does not seem as perfect as it was formerly. I had a conversation with him some time before his injury, while we were boarding together at the hotel; found he was a man of a bright, quick mind, good education, and seemed to be a competent young physician, and once, while I was ill, I asked him to prescribe for me. I took his prescription. I don't think his mental faculties now equal to what they were before. I think his injuries permanent.

Cross-examination:

I can't say certainly that he never will recover. Injured people sometimes surprise themselves and the doctors by recovering after a long affliction. I can't say that it is impossible that Dr. Jones will recover, but I do think it improbable. I have not examined him or talked to him since we came here to this trial. I can't say that it was his memory that seemed to be deficient, but his faculties did not seem to be entirely normal; they seemed to lack co-ordination. As I was counting the strikes of the driving-rod the locomotive was rapidly approaching the hotel. It was about beside the east corner of the depot when I stopped counting. I was looking out of the east window, midway of the dining-room.

Re-examination:

When I examined Dr. Jones last I did not think he was in as good mental condition for practicing medicine as before hurt. I
59 don't know how competent he is to practice now, but I shouldn't like to take one of his prescriptions myself. I think his judgment would be faulty.

W. C. JONES, being duly sworn, said:

I am 23 years of age. I was residing in Jonesboro' in July, 1883; had been studying there since the first part of June. I was injured there July 16th, 1883. I am the plaintiff in this suit. I was hurt in the forenoon. I don't know how I was hurt. I was in the depot on business. I remember well having passed the depot wall and that is the last I remember. When I came to temporary consciousness that was the first thing that came to my mind. That came to my mind twenty days afterwards, on the 5th of August. I never heard the train. I was passing from the depot at the west end in an ordinary walk. The passenger platform was directly opposite the tracks. There is one track between the wall of the depot and

the passenger platform. There is a side track there that goes through the depot. I didn't know that the train was approaching. I had no knowledge of its coming at all. There was no train coming, so far as seeing was concerned. I looked that way to the west and listened for trains as I went out from the depot. I heard no train. From the point where I left the depot to the point where I lost consciousness may be in the neighborhood of about 20 feet. The door out of which I passed from the depot is the usual way by which to go to and from the depot. I had no sort of warning of the approach of the train. I was at the depot to pay a freight bill. I had been in the depot about 20 or 30 minutes. I am not sure. I don't know when I got up and got about or how long I was confined to bed. My books or accounts say I left Jonesboro on the 16th of August. My brain was particularly affected. I don't know where I was struck from consciousness of the injury, but I know from the feelings I had that I was struck here on the head and at different places on the body. I was scarred on the shoulder and here on the head and on my hand and there may be other places that I don't know of. I haven't, since that accident, been able to pursue my business. When I would feel like working, suddenly a pain would come to my head and I was left almost without reason. I feel the results of the injury at this very minute. There is a heavy sensation all through my head and a pain sometimes shoots through it. My eyes are dim. There is a general lassitude of the body. At times it wouldn't seem so, but it would get that way in a minute, without warning. I cannot say whether it is better or worse than it was 6 months ago. I have some consciousness of relief in some respects from the injuries. I have a faint recollection of when I was half unconscious, and so that I couldn't turn on the left side without agonizing pains in my head. Now there is considerable, but not of the character they were. I am not sure sometimes about walking rapidly and making a turn; sometimes I do very well. I have tried it and stumbled. I get a dizziness in my head and will stagger when I turn. A short time before the injury I was in the fruit evaporator business. Before that I was a physician. I was educated for a physician and had practiced from the 1st of July, 1881. In the practice of my profession I earned in the neighborhood of $100.00 per month. I think I am permanently injured. (A plat showing place of injury is here produced and offered in evidence by plaintiff.) (Witness shows by plat the door by which he came out of the depot, the passageway to the track, the location of his business place, and the hotel just opposite depot where he was living.) I was between the platform and the wall of the depot, and that is the last I remember. The way I was going I couldn't see a train approaching from the east. There was a car on the side track of the depot, so that I couldn't see without stooping. One step would carry you from the wall of the depot to the track. (He here indicates a plat where platform was.) I walked from the depot in a slow walk. As I was coming from this door here I listened for the train, as I have said before. That was a habit with me. After my injury I first

went to Michigan, then to New York, then to Illinois, where I
61 tried to practice for about a year; didn't make enough to pay expenses. In Illinois I only made debts. I then went to Pennsylvania; tried to make a practice there; staid there about a year; began bleeding at the lungs; was advised to try a milder climate. I went to Florida; spent a year or two there; tried to practice there, then came into South Georgia, where I have been for over a year past. I get some practice in both these places and am practicing now, but don't get much for it. I can't collect my bills. I suppose my practice since I have been hurt would amount to about three hundred dollars a year, but I have not collected more than half that much. I have never entirely recovered from my injuries. I lost my sense of smell and have never recovered it since my hurt. My sight has also been deficient. I have been sometimes compelled to use glasses—sometimes very strong ones. My knee is still weak. I suffer occasionally from partial paralysis in my leg and one of my hands at times. It is cold and clammy. I have also lost my wife. She left me.

Cross-examined:

Had been in Jonesboro' since first part of June. I lived in the hotel at the depot. I knew the schedule time of the passenger train. I had seen the freight trains pass down every morning. I was there. I did. I don't remember about the freight coming up in the evening. I probably knew then. I was familiar with all the passenger trains. I did not notice the others particularly. I knew a freight train was due in the morning, but I did not know the hour. I had been at the depot a great deal, being there at the hotel. I knew the construction of it. I don't think I had been at the eastern end of the depot that morning. I know Thomas Deene was at the depot. That is all I know about it. I don't know whether I had assisted him to load on evaporators a few minutes before the accident or not. I know I engaged him to haul that machinery to
the factory. I don't recollect about helping him. I won't
62 say I didn't. I don't remember his saying to me that the train was co-ing and that we couldn't get past. I don't remember that I threw my coat on my arm when he said this and run off. The reason that I remember some things and not others is that I have been insane since, and after the injury forgot everything, and it has been a year since and things are coming back to me. I may have been running through the depot, but I know I walked after I got out of the door. I might have run inside the depot, but I don't say that I did. I don't know that I did run down the steps. I don't say I didn't. I was walking my natural gait. I seldom walk down steps. My natural gait is a walk. I did not look up the railroad track toward the East or listen in that direction for any approaching train. I did not stop. I was thinking about my business. I looked towards west and listened for the train because it was my habit to do so. There was nothing more than lumber piles to obstruct view of the track from the west. The side track ran through the depot, and there was a car standing on it in the

depot there. At the time I went down steps and across side track I was thinking about my business, which was my machinery and getting it down to the new building.

Re-examination:

I didn't have the opportunity to look up east, because as soon as I got where I could look I was struck.

(Plaintiff, by his counsel, offered to prove by the witness that at the time there was much noise in the depot caused by the moving of freight and machinery and running of trucks over the floor, whereby the noise of the approaching train was rendered inaudible to him passing through the depot and on the platform to the track, but the court excluded the evidence as immaterial; to which *writing* of the court plaintiff, by his counsel, then and there excepted, and the same is hereby made a part of the bill of exceptions.)

Here plaintiff rested.

63 The defendant read the depositions of the following witnesses from printed record:

ANDY TRUSLLER, being duly sworn, said:

I live in Jonesboro'. I have been about the neighborhood of the depot about four years. I was at flour mill when Jones was hurt. I never paid any particular attention to the running of the train that morning. It was running rather fast—faster than usual. As it passed around there at the mill I judge it was going at ten miles an hour. It was running faster than I could run, for I was aiming to catch on to caboose as it passed by and ride down on it to the depot, but it was going to- fast for me. It was the local freight. It ran past the depot below the road crossing west of it. (The caboose generally stands middleways of the depot, opposite the hotel. Admitted to be a fact by def't.) At the west end of the depot you have got to pay some attention or you cannot hear a train approaching from the east. If you aren't listening or paying attention it will get to the hotel before you hear it. There was a car in the depot on the side track. (It is here admitted in evidence by def't that a freight box-car was standing at the lower west end of the depot on the side track, in the archway running through the north end of the depot from east to west.) I saw Jones after he was struck and train had passed him.

Cross-examination:

That mill is 60 yards, I suppose, from the west end of this depot. I heard the train coming. I heard it whistle for town when I was in Mr. Booth's shop and remarked to him that, There comes the local! and went out walking slowly. After it passed the mill, when it was between the mill and the depot, it whistled for brakes. I didn't hear the bell. It may have been ringing. I didn't pay any attention to it.

Redirect examination:

I never measured the distance between the mill and the west end of the depot.

64 D. P. O'BRIEN, being duly sworn, said:

I was right in front of Reeves' mill and 150 yards above lower end of depot; may be an 100 yards only. I was on my horse and heard the train coming. It came so fast I couldn't get past. I stopped at the mill there within 15 feet of the track, on the west side of the track, next to the street. If the train give any signal I didn't notice it. After it passed the mill it blew on brakes—one whistle. I don't think bell was ringing. I was on a very scary horse and it was cutting up terribly, and it may have been ringing and I wouldn't notice it. I can't say whether it was or not. The running of the grist-mill resembles the running of a train.

Cross-examination:

The train whistled as it passed me about 150 yards from the west end of the depot; it may not be quite that far. I think a man at the west end of that depot would have no difficulty in hearing that whistle. It looks as though a man might have heard it.

JOHN A. GRISHAM, being duly sworn, said:

At the time of the accident I was standing in the door of my store in Jonesboro', about 200 yards in a straight line from the corner of the depot where Jones was hurt. I saw Mr. Jones get hurt. I saw him come out of the depot. He went down here (indicating on plat), and as he come out from behind the wall the cross-beam in front of the engine struck him. From what I could see it hit him about the hip; that is all I saw. He fell, and I didn't see any more of him until he was picked up. I noticed the train was running pretty rapidly. I cannot tell how fast per mile. I don't remember whether they were ringing the bell or blowing the whistle. The first I saw of Jones he was struck down these steps. I didn't think about the train till he struck it. I think Jones was walking very
65 fast when I saw him. I have frequently been there at the west end of the depot when trains were coming in from the east. There is a side track running through the depot. When it has no cars on it you can see through the depot. You can see through when it is blocked with cars; I have tried it. You can see through with cars on the track. The track curves there very little. With a car there you can see a train coming out here at the edge of the wall. I don't know that I have ever stood there and listened for an approaching train. I think anybody could hear an approaching train at that point if they would pay attention. I went over to see Mr. Jones; he was hit above the eye. One was here at the eye, one on the head, and one at the head and one at the back of the thigh. He was senseless. I stayed with him 2 or 3 nights while he was confined to his bed. He was confined there

probably 3 or 4 weeks; maybe longer. The last time I talked with him in Jonesboro' he didn't seem to be in his right mind. Sometimes he would talk with usual sense and at other times he would fly off.

Cross-examination:

I knew a train was coming when I saw Jones going across towards the main track; I heard it. It may be 200 yards, may be less, from the corner of that depot to the place where I was standing. Jones was in his shirt sleeves; he had his coat on his arm; he didn't stop at all; he walked right down the steps; he didn't look up or down the road. It was the cross-beam or pilot beam that struck him.

—— WEAVER, being duly sworn, said:

I reside in Jonesboro' and remember the time when Dr. Jones was hurt. I was running the flour mill that day. I saw the train coming in. I was standing on the platform in front of the house. They blew a signal at the saw-mill and again at the crossing, and the bell was ringing when it passed me. When it passed me its speed was from 8 to 10 miles. I am no- an employ- of the railroad and never have been. I recently stopped at the west end of the depot for the purpose of seeing whether I could look through the archway when there was a car standing on the side track in there, and I found that you could see through and see the track above. There is a space of 14 inches; there is a curve in there; it makes the space small, but then you can see through and above on one side for between 50 and 60 yards, and on the right-hand side you can see above the mill. The depot building is partly over the track. There is an open space above the cars. I remember where that platform stood. The space between the lower end of the depot and the upper end of that platform is between 9 and 10 feet; not over ten. The distance between the north wall of the depot and the south rail is about four feet. I think I measured it. From the west end of the depot to the crossing west below the distance is about 60 yards. I walked down to the depot after the accident occurred. I saw where the caboose stopped. From the western end of the depot to where the caboose stopped is 65 or 70 yards; not over 70.

66

Cross-examination:

I have observed where that little platform stood. I know it was 9 or 10 feet from this wall. I don't know exactly to the very spot where it was. I stepped off the distance between where it stood and the wall one day of last week. I know where it stood. I have seen it there 3, 4, and a dozen times a day. There is nothing there now to tell where it stood. I stepped off the distance from where it always stood. You couldn't stand on that platform and put your hand over on the wall. I noticed the platform at the time Jones was hurt. I thought I would be asked these questions and thought

I would step in and see. The platform might have been taken away a few weeks after or a few weeks after Jones was hurt.

67 I can't say as to that. It was taken away next week after the accident. Jones' getting hurt was what called my attention to the train. I noticed it was going fast when it passed. After he was hurt that called my attention to it. It whistled at the mill; it doesn't do that usually; that called my attention. There was nothing peculiar about the ringing of the bell; it might ring and I wouldn't notice. The clock might strike in the house and I wouldn't hear it. It didn't miss ringing that day, I am positive. I don't recollect about its ringing the day before or the day after; there was nothing to call my attention to it.

G. W. St. John, being duly sworn, said:

I reside at Carter's depot. I was a passenger on the train that hurt Dr. Jones. I don't recollect to have noticed any signals; that was the local; I come to Jonesboro' very frequently on that. I had my satchels in my hands ready to get off at the Washington house; some one was speaking about its running very fast after the accident, and I remarked that I could have stepped off the train easily as it went by the Washington house—right opposite the depot. I got off right opposite Sam. Anderson's door. From the hotel to where caboose stopped is 68 yards; I stepped it off.

Cross-examination:

I remarked at the same time in connection with my not getting off till it stopped that I had long since resolved never to jump off a moving train. John Allison heard these remarks and that is what got me here. As it passed the depot the caboose wasn't going more than 5 to 7 miles an hour, if that. I don't know anything about the speed of the engine when it passed the depot.

68 C. H. Waring, being duly sworn, said:

I am a civil engineer in the employ of the railroad Co. I have made a drawing of the ground and photographs of the buildings at and near the place of the accident, and here exhibit them. The plat or map is made upon the scale shown on the face of it, and was made upon a survey of the ground. The two photographs show the depot approaching it from the east and west respectively. The pilot beam, I should think, is about six feet wide—a little over that. The width of a box car is 9 feet on an average.

Cross-examination:

I never measured the pilot beam. In some cases the pilot beams would project a foot on each side; no two are alike; they will project beyond the track. I don't ever remember seeing—as long as a car is wide; they are not as long as cross ties. I made these plat and photographs a month ago. The distance between the wall and the south rail of the main track is between 4 and 5 feet.

The plat and photographs are here introduced in evidence by defendant, and they are marked respectively Defendant's Exhibit No. 1, Defendant's Exhibit No. 2, and Defendant's Exhibit No. 3 to C. H. Waring's deposition. (By consent it is ordered that the foregoing exhibits be certified up with the record as original papers.)

THOMAS DEFRE, being duly sworn, said:

I reside at Jonesboro'; I run a dray there. I had a load of his evaporators—the first load at the depot—at the upper corner—just before the accident occurred. Jones helped me to load the evaporators; he left me in a run. I couldn't have been more than two minutes before I saw him injured—hardly that long. The train was right pretty near at the depot. I told him it would be some time before I could get out of there. He said, Then I will
69 go on down and you can come as soon as you can. The train was then approaching. We were both there together and we were talking about it. He had a black coat; he gathered it up and struck a trot and ran through the depot with it. When I first saw him next he was under that platform; that was about a minute and a half or two minutes after he left me. I heard it whistle 2 or 3 times as it approached. I heard it blow the signal, and it blew on brakes 2 or 3 times. The bell was ringing all the time.

Cross-examination:

He had his coat off. He gathered up his coat and struck a trot, running on down towards the ticket office. I saw him at the door there; that was the last I saw of him. My wagon was standing at the platform. I guess he knew the train was coming. We talked about it, he and I. I am sure he knew the train was coming. If he wasn't a deaf man he heard the train. I don't think he was deaf. We talked over that the train is right here. I told him I couldn't get across, as the train was here, and he says, You come as soon as you can, and I will go on down and get you a hand. We had just got loaded as the train was there. It was right about the trestle-work. You could tell by the noise where it is. The trestle-work is up by the saw-mill, about 100 yards above the depot; it may be a little farther; I am not positive about the distance. The train was right there, judging from the noise, the ringing of the bell, and the blowing of the whistle. I told him I couldn't get past to go on, and he says, I will go down to the building and get you a hand to help you take the stuff off of the wagon. Says I, The train is right here; I cannot get across. He says, You can come as soon as you can, and I will go on down and get you a hand. My contract was to take the stuff from the platform. The train stops there sometimes longer than 15 or 20 minutes, so that you couldn't cross from one side to the other, and that is what I was talking about. I couldn't cross the crossing there at the jail while it was there. When
70 he left me that was the last I saw of him till he was hurt, lying at the edge of that little platform. I don't think it

was more than a minute or a minute and a half till I went there. After the train passed I threw down my lines and went around there.

WILLIAM PATTEN, being duly sworn, said:

I was standing out on the platform, in front of the depot door, when Jones was hurt. I saw the accident. Mr. Jones came out of the door of the depot. He was walking very fast, and when he got opposite the window he ran until he hit the engine. I think he hit the pilot beam of the engine and was struck about here, and he hit the platform and fell and it knocked him, and when the train passed he was about 19 cross-ties below the place where he was first hit. I was not over 10 or 15 feet from him, standing there on the platform. He got faster and faster till he got to the window, and he ran and stepped half way down the steps and the next step half way between the side tracks. I heard the train coming. I heard the bell ringing. I heard the whistle three times. I wasn't then in the employ of the railroad Co.; I was learning telegraphy. Zeke Guggenheimer was standing there with me. Mr. Oakley was standing on the platform when Jones came to the door, and a man came for a ticket and he went into the depot to wait on him. Mr. Oakey is very sick now. Jones didn't stop to look for a train. I would have seen him if he had. He didn't stop at all till the engine hit him. He didn't look nor listen. It seems that he knew the train was coming from the way he was acting.

Cross-examination:

That is what I thought—that he knew the train was coming. I am now in the employ of the railroad company. He commenced running at the head of the steps. The steps were about as long as the width of this table. The pilot beam sticks out a foot or
71 two. I don't know that it comes out to the end of the cross-ties; I can't say about that. That is what struck him. It hit him and knocked him against the platform. If that little platform hadn't been there I think he would have been knocked back on the side track. It wound him up in this sort of way when he fell. I had never seen an accident there before.

GILES JACKSON, being duly sworn, said:

I live in Jonesboro'; I was living there when Jones got hurt; I saw the accident. The train was coming from the east, running west, and I was sitting angling, this way, and I heard the train coming and the bell ringing; I was looking over towards the depot. Mr. Jones came running down from the end of the depot, down to the track, and just about the time he got there the engine was there and the pilot beam struck him; it knocked him under the platform betwixt the tracks, about 4 feet; maybe 3. He was running when I saw him. I think he had on a black coat.

Cross-examination:

I wouldn't say for certain that he had on a coat. I noticed him coming and running against the engine. I saw him before he come down the steps; I saw him run down the steps; he ran against the train; he struck the train. I didn't see the engine strike him more than once. I didn't see him after he was hurt; I just saw him running into the train.

THOMAS BEARD, being duly sworn, said:

I live at Jonesboro'. I remember — time when Jones was struck; I was standing at the railroad crossing above the jail, west of the depot. I saw the engine strike him. I saw Jones come running out of the depot door, and, as well as I recollect, he had his coat on his left shoulder, up this way, and he came running out and made three or four jumps, as well as I recollect, jumping off of the
72 platform down on the steps and then to the side track and then between that platform and the wall, and just as he jumped there the pilot beam of the engine hit him.

Cross-examination:

I don't know exactly the length of the pilot beam; it is long as a cross-tie. When it passed me at the crossing it was running 7 or 8 miles an hour. It ran 50 or 60 yards below the depot. He come out of the depot door running. He first jumped down 2 or 3 steps, then to the side track, then betwixt that little platform and the wall, and he was in the act of taking another step when he was struck. He was betwixt the side track and the main track when he was hit.

JOHN CUNNINGHAM, being duly sworn, said:

I am living at Jonesboro'. I remember — time when Dr. Jones got hurt; I saw the accident; I was on a bridge down there between the jail and the calaboose, about 150 feet from the depot. I saw Mr. Jones come out in a pretty fast run; he had his coat on his shoulder. He run down into the engine.

Cross-examination:

The pilot had sort of passed him a little, and that big cross-piece—the pilot beam—struck him. I could not see Jones as plainly as I could see that door over there. Anybody can reach to the top of the platform between the hotel and the jail.

JOHN POINDEXTER, being duly sworn, said:

I remember the time when Jones got hurt. I was living at Jonesboro' then. I saw the accident; I saw Mr. Jones come out of the depot; he was in his shirt sleeves; he had his coat on his shoulder; he came out of the depot in between a fast walk and a trot and he cleared a trot down the steps, and when he got
73 into the railroad he and the engine met. I was standing below the jail, at the lower end of the platform, in plain view, where I could see him; John Cunningham was there with me.

Cross-examination:

I can't say that he was in a run when he came out of the depot, but when he come down the steps he trotted down. He come down in a hurry. He didn't walk down. I suppose he didn't come down any different from what people do when in a hurry. He didn't walk down the steps. He was in a trot still after he came down the steps and he ran into it—he dashed into the engine when he got to the corner, where, it appeared to me, he whirled himself as if to turn away from the engine, and his face was down the track. I don't know how high the pilot beam is or where it would strike him.

Redirect examination:

I think I heard the train whistle before it came to the depot. As the engine passed me the bell was ringing. I don't know as it was ringing when it passed him.

2nd cross-examination:

I heard the whistle blow up about the bridge or trestle; somewhere up there. It seemed to me the bell was ringing as the engine came down between the hotel and the depot. When it struck him I broke to where he was, and I noticed then that the bell was ringing.

This was all the evidence in the case.

The plaintiff asked the court to instruct the jury in the case as follows:

I.

The statute of Tennessee requires a R. R. Co. when its train is approaching a city or town to "sound" the bell or whistle when the train is at the distance of one mile and at short intervals till it reaches its depot or station," and provides that if it "fails to observe these precautions or cause them to be observed by its agents and servants it shall be responsible for all damages to persons occasioned by or resulting from any accident or collision that may occur."

74

R. R. *vs.* Gardiner, 1 Lea, 690, 71.

This means that until the train reaches its usual stopping place at a station it shall "sound" at short intervals such alarm signals as will notify people of the approach of the train and enable them to keep out of its way. The sound of the signal must be loud enough to be heard by persons giving attention at and around the depot of the railroad Co., and if the depot be so located or constructed as to make it unusually difficult to hear at and around it, then the alarm must be sounded louder and more frequently than usual, so that it may be audible to persons around the depot having business there and passing to and fro on such business with the company and sufficient to warn them of the approach of the train.

If in this case the agents of the defendant company failed to

so sound the whistle or bell at or near the depot while approaching it as that it could be heard by plaintiff or any other person with the usual sense of hearing at the west end of the depot and about to cross the track at that place, then it would be responsible to plaintiff in damages for all injuries resulting from the accident or "collision" that occurred to plaintiff when so crossing the track, whether plaintiff's negligence contributed to the injury or not. Contributory negligence does not defeat this statutory action, but wherever it exists it operates only to reduce or mitigate damages. If therefore you find in this case that the defendant is guilty of statutory negligence your verdict will be for plaintiff; but if you further find that plaintiff's negligence contributed directly
75 to produce the injury, then, in estimating damages, you will reduce the same in proportion to the extent of such contributory negligence.

Declined.

HOWELL E. JACKSON,
Circuit Judge.

II.

Independent of this statute of the State, defendant may be liable to plaintiff on account of its negligence at common law, provided that its negligence was the proximate cause of the injury and plaintiff did not by its own negligence contribute to cause the injury.

It is negligence to run a train without brakes or with broken or disordered brakes that will not serve to control the train.

It is negligence to run a train at high speed through a town or city without giving such alarm signals as will warn people of its approach and enable them to avoid danger of collision with it, and especially so when approaching a crossing provided by the company itself for the use of its customers, particularly if the crossing be so located that it is difficult to hear and impossible to see and approaching train till within a single step of it. 35 N. Y., 79.

In such cases the company must exercise the utmost caution to avoid injury and give warning to those there on business and crossing on its invitation.

Ibid.

A pedestrian is not bound to stop when about to cross a R. R. track, but he must look and listen; but if defendant has so constructed its depot and placed its cars that, though looking, plaintiff could not see an approaching train as he came to the track and listening with ordinary care he could hear no signal and he is struck as soon as he comes in sight of the train by its run-
76 ning at a reckless rate at that place, then plaintiff's failure to stop sooner will not bar his recovery, for he is not bound to presume negligence on part of defendant, but has the right to presume that it will give proper signals and not run at unlawful speed.

Black's Acc't Cases, pp. 109, 122, 129, 130–1, 136–7, 145, 156–7, 162–3, 165, 182, 188, 193.

Deering on Negligence, 240, 241, 243, 252, 255.

Declined, except as covered by general charge.

HOWELL E. JACKSON,
Circuit Judge.

III.

Where the dangerous character of the crossing is enhanced by its negligent construction this itself is an act of negligence for which the company may be held liable.

1 Thompson on Negligence, 422.
Indianapolis, etc., R. R. *vs.* Street, 53 Ind., 143.
Payne *vs.* Troy, etc., R. R. Co., 9 Hull, 526.
Richardson *vs.* N. Y., etc., R. R., 45 N. Y., 846.

When there are obstructions, either natural or artificial, which obscure passing trains from approaching travelers this is a circumstance which demands of the company the exercise of increased diligence, and when the obstructions are upon the right of way of the company and are of its own construction or exist by its permission this is such negligence as may render it liable for injuries occurring at a crossing thus obscured.

2 Thomp. Neg., 422.
Mackay *vs.* N. Y., etc., R. R. Co., 35 N. Y., 75.

And so here the erection and continued use of a depot so near to the main track that any one having business there with the railroad company and leaving said depot to return to the pas-
77 senger platform by the usual passway could not see an approaching train until he was within two feet of the track is in itself negligence, and required, because of the extraordinary danger of the crossing, an extraordinary degree of care from the company in running its trains past said depot, and failure to use such care would make the company guilty of negligence.

Ibid.

Declined, except as modified and covered by the general charge.

HOWELL E. JACKSON,
Circuit Judge.

IV.

The negligence which will preclude a plaintiff from recovering in an action of this nature must be such that he could by ordinary care have avoided the consequences of defendant's negligence.

For although there may have been negligence on the part of plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of defendant's negligence, he is entitled to recover.

2 Thomp. on Neg., p. 1107.

A superior degree of diligence cannot be required. Ordinary care is sufficient. It is not the law that slight negligence on the part of the plaintiff will defeat his action. To do this his negligence must have been an efficient and proximate cause of the injury.

Id., pp. 1149–1153.

For though plaintiff may in some slight degree have been guilty of negligence, yet this would not prevent him from recovering damages caused by the negligence of the R. R. Co., provided that notwithstanding plaintiff's slight negligence, if he was in the use of ordinary care, the Co. could, by the exercise of the degree of
78 care required of it under the circumstances, have avoided inflicting the injury.

Id., p. 1105 *et seq.*

Declined, except as covered by general charge.

HOWELL E. JACKSON,
Circuit Judge.

V.

A defendant charging contributory negligence must prove it by a preponderance of evidence.

R. R. Co. *vs.* Mares, 123 U. S., 710.

Given.

HOWELL E. JACKSON,
Circuit Judge.

VI.

If you find for plaintiff, then you will assess damages to compensate him for his injuries and losses.

You will take into consideration—

His age, state of health, and capacity for earning money at the date of his injury.

The expenses incurred for nursing and physicians' bills on account of said injury.

The mental and physical suffering and agony endured in consequence of said injury.

His loss of health, of body and mind, temporary or permanent.

His loss also of ability or capacity for earning money and the consequent loss of profit reasonably to be expected from the practice of his profession.

And you will assess such sum in gross as in your opinion will compensate him for such injuries and losses as were the natural result of the accident.

Given.

HOWELL E. JACKSON,
Circuit Judge.

79 But the court charged the jury as follows:

GENTLEMEN OF THE JURY: The plaintiff sues the defendant to recover damages for personal injuries sustained by him from a collision with a freight train of defendant at Jonesboro', Tennessee, on July 16th, 1883, which collision, it is alleged, was caused by defendant's negligence.

The def't denies the charge of negligence on its part and by way of further defense sets up that the collision from which pl't'ff's injuries resulted was caused by his own negligence.

The pleadings thus present two issues or divide the case into two branches: First, the alleged negligence on the part of the def't; and, secondly, the contributory negligence on the part of the pl'tff. On the first issue the burden of proof is upon the pl'tff, and upon the second it is upon the def't. By the burden of proof it is meant that on the question of def't's negligence the plaintiff has the laboring oar and must establish by a preponderance of evidence the negligent acts of def't complained of and which were the proximate cause of the collision. On the other hand, upon the question of plaintiff's contributory negligence, relied on as one of its defences, the laboring oar is upon the defendant, and it must show by a preponderance of proof that plaintiff was guilty of such contributory negligence. In other words, each side is called upon to prove its affirmative charges.

In this connection it is proper for the court to define the term negligence or to give you some explanation of its meaning, so that you may have some guide or test to apply to the facts established by the proof and determine whether the acts complained of by the one side or set up as matters of defence on the other constituted negligence. The fault of negligence may consist in omission or commission. It is the failure or omission to do something
80 which a reasonable and prudent man, guided by the considerations which ordinarily regulate and control the conduct of human affairs and actions, would have done, or the doing of something which a reasonable and prudent man would not have done under the circumstances. It must be determined in any case by reference to the situation and knowledge of the parties concerned and all the attendant circumstances. It is the failure to exercise that proper care or to observe that caution that the exigencies of the occasion and situation dictate and demand on the part of reasonably prudent persons having a proper regard to the safety and protection of themselves or others. It is the want of ordinary diligence, which is itself a relative term to be judged of by the nature of the subject and occasion to which it is directed and applied. What would be ordinary diligence under one state of facts and circumstances might under other and different conditions and surroundings constitute negligence. Now, the negligent acts of omission and commission which plaintiff charges against the defendant are that def't's train which struck him did not comply with the requirements of the Tennessee law in giving signals at short intervals of its approach to the station at Jonesboro'; that said train was run into and past said station at a high and dangerous rate of speed, and that its depot building on the south side of main track and adjoining switch was so defectively constructed and located as to be dangerous to persons having occasion to cross the main track of the road in going to or from said depot, especially as to trains coming from the east.

By an amended declaration plaintiff alleges that some six or eight feet west of the depot building the defendant had erected a delivery platform between the main and side track, which was in dangerous proximity to the main tracks and against which he was thrown when struck by the train running on the main track.

81 The evidence in this case will not warrant you in finding that the defendant was in fault in the matter of "signals" at short intervals as its train approached the station. Two or three witnesses for the plaintiff state that they heard no whistle sounded or bell rung as the train approached Jonesboro'. They do not say that they would have heard said signals if they had been given, but merely that they did not hear them. This sort of negative testimony fails short of establishing affirmatively that such signals were not given, especially as other witnesses for the plaintiff and at least six unimpeached witnesses for the def't state positively that the train did, from time to time and at short intervals, sound its whistle and ring its bell as it approached the station: that the signals given induced them to shut down on the brakes. This is affirmative testimony to the fact that the "signals" required by the law of Tennessee were given and it outweighs any presumption to the contrary arising from the circumstances that two or three persons did not hear any signals. So, under the evidence upon this point, you cannot properly find that def't was guilty of negligence in failing to give "signals" of its approaching train.

In respect to the next fault charged, viz., that def't's train was running as it approached and passed the station at too high a rate of speed, the evidence is somewhat conflicting. Most of the witnesses say it was running pretty fast as it approached the depot: some say unusually fast for a freight train. They, however, differ very materially as to the rate of speed at which the train was running. One of plaintiff's witnesses estimates it at 10 miles per hour, another at 14.72 miles an hour, and a third at 17 miles an hour. Witnesses for def't state as the train passed or reached the depot it was running at the rate of six or seven miles per hour. One witness (St. John), who was a passenger on the train, says he could have stepped from the caboose in which he was riding to
82 the passenger platform as it passed that point if he had felt induced to do so. It is for you, gentlemen of the jury, to determine from this evidence whether the train was in fact running unusually or dangerously fast as it approached or as it passed the depot or station at Jonesboro'. In considering and determining this question, you may properly look to the fact established by the proof that the train stopped within a short distance after passing the depot. Witnesses vary but little as to the distance the train went beyond the depot mentioned before it stopped. There were, as it appears or as stated by one of plaintiff's witnesses, 15 cars in the train; according to another witness for the plaintiff, the engine stopped some 600 or 700 feet west of the depot, and by several witnesses it was stated that the caboose or rear end of the train stopped about 60 or 70 yards from the west end of the depot. No evidence has been introduced showing or tending to show within what distance a train, moving at a given rate of speed, can be stopped by the ordinary appliances employed on freight trains. Under these circumstances you must apply your experience and judgment to the facts and determine for yourselves whether a train running at a high or unusual rate of speed could have been stopped within the distance stated,

and in that connection you should consider the fact, as shown by the proof, that there was a slight down grade to the west at that point. No evidence has been introduced to show that there *was* any defects in the brakes or proper appliances for stopping the train or that it was deficient in train force, and in the absence of such proof you should assume that the train was properly equipped. A railroad Co. is required to exercise more care in moving its trains through a town or city or in passing a station where persons are in the habit of crossing its tracks than it observes in running over its general line, and if you find from the proof in this case that def't's
83 train which collided with plaintiff passed the Jonesboro' station on that occasion at an unusual and dangerous rate of speed that would constitute an act of negligence on its part which would render it liable for injuries resulting solely or approximately therefrom.

The plaintiff further claims that def't's depot and track and delivery platform at Jonesboro' were so defectively constructed and arranged as to be especially dangerous and hazardous to persons on foot who might have occasion to cross its main track in going to or from the depot building over the usual line of transit, for the reason that the *the* outter solid wall of the arch through which the side track ran into the depot building and the curve in the main track as it approached and passed the depot rendered it difficult if not impossible to see a train approaching from the east. The location of the track and depot building and grounds have been exhibited to you by means of photographs and plats and you are familiar with the situation. The law does not in general undertake to control or restrict a railroad company as to the curves it shall make in its track, whether in depots and yards or on its main line. These are matters of engineering skill to be determined by the requirements of the situation. So, too, in reference to the character and location of their depot buildings; they may exercise a reasonable discretion, having a due regard to the safety of passengers and the public with whom they transact business. They are required, so far as passengers and those having occasion to visit their premises on business connected with the roads —, to have reasonably safe structures and tracks. If, for instance, there are defects in railroad platforms, structures, or tracks, which cause injury to passengers or to persons lawfully using the same, the railroad company would be responsible in damages; but the question of the proper location of depot buildings on such grounds as the railroad may possess
84 or be able to acquire and of the engineering judgment and skill involved in the making of curves in its tracks approaching such buildings should not be confounded with defects in such structures. The latter *per se* import negligence, the former do not; but while bad, inconvenient, or injudicious arrangement of tracks and buildings do not in and of themselves constitute negligence they may make the particular locality to those dealing or transacting business with the company at such places so dangerous and risky as to impose upon the company a higher degree of diligence and care in operating its trains there than would otherwise be in-

cumbent upon it. The more dangerous the situation the greater would be the duty and obligation of care and caution to avoid accidents, especially in favor of persons not aware of the increased danger. Counsel for plaintiff has characterized the location of def't's track and depot building and platform at Jonesboro' as a "man trap." If the place was as perilous as that strong term implies, while it would impose upon the defendant a corresponding degree of care and diligence in passing there, it would be the duty of persons familiar with the situation, surroundings, and dangers involved in crossing the main track at the point plaintiff attempted to do so, to exercise also a degree of care and caution corresponding with the dangers. If a person unacquainted with the situation and the risk involved in crossing the track at such place should be injured while making the attempt his right to recover upon showing a want of proper care on defendant's part would not depend upon or require the exercise of as much prudence and caution as would be incumbent upon another who, with knowledge of the situation, surroundings, and dangers, should make a similar attempt and get injured. Knowledge of the situation and risk would impose upon the one a higher degree of care and prudence than would be demanded of the other who was ignorant of the facts and surroundings which would reasonably put a prudent person on his guard. It is conceded as well as established by the proof that plaintiff was familiar with the location and structure of def't's depot, building, tracks, and platforms at Jonesboro'; that he
85 was there for over a month before the accident, and had frequent occasion to go to and from the depot building across the tracks and along the same route he was pursuing on the day of the accident. The perils arising from the curve in the main track as it approached and passed the station, from its proximity to the outer wall of the depot arch and from the obstruction which that wall presented in looking eastward while passing along the west end of the depot building, were seen and known to him. The position of the tracks and the obstruction which, more or less, shut out from view trains approaching from the east when persons were at the west end of the depot were all open and visible. The chief danger consisted in passing the west end of the outer wall of the arch and stepping upon or close to the main track, which was about four feet north of said wall. The situation, surroundings, and danger being known to plaintiff, it was incumbent upon him to exercise reasonable care and diligence in avoiding the peril involved in stepping suddenly or hurriedly from behind said wall on or upon the main track. Did he exercise such care and caution as the situation and his knowledge of the dangers required? This brings you to the consideration of the defendant's affirmative defence, viz., that plaintiff did not exercise the caution and diligence which was required of him under the circumstances, and that in failing to do so he was guilty of contributory negligence such as will deprive him of the right to recover of def't damages for the injuries sustained. Thomas Deere, the drayman who was helping the plaintiff move his evaporating machinery from the depot, states that the

plaintiff was hurrying him to get across the track as the train was approaching; that he told plaintiff the train was coming so he could not cross till it passed; that he and plaintiff talked about the train coming, and that plaintiff knew it was approaching; that its approach could be heard; the whistle and bell both being
86 sounded; that plaintiff left him and ran through the depot without stopping and attempted to cross the track, when the engine struck him. The plaintiff states that he does not remember helping Deere with the machinery; that he could not recollect that Deere said that the train was coming; that he could not state why he was running except it was habitual with him to move rapidly; that he did not learn or hear from Deere or any one else that the train was approaching when he hurried through the depot and out towards the main track. If you believe the statement of the witness Deere, then the attempt of the plaintiff to hurry across the track in front of the approaching train would constitute negligence on his part and defeat his right to recover. When a person under such circumstances takes the risk of crossing a railroad track in front of an approaching train he must bear the consequences of failure or miscalculation. He cannot cast upon the railroad company the hazard of his experiment. You should, if you can, reconcile the evidence of witnesses as far as possible; but if that cannot be done, then, in case of conflict, such as exists between the testimony of the witness Deere and plaintiff, you must determine for yourselves which you will believe. There are a few general rules in weighing evidence which the court may suggest for your guidance when testimony is conflicting and irreconcilable. You may look to the interest of the witness, the result, to the consistency of his statement, to his opportunities of knowing the facts about which he testifies, to the probability of his story and its harmony with established facts, to the manner of testifying, to his bias in favor of or against one side or the other. These general suggestions as to weighing the testimony apply to any and all conflicting statements of witnesses and are not confined to the testimony of the witness Deere and plaintiff. If you, upon weighing the testimony of plaintiff and said Deere, conclude that plaintiff was not informed or did know or hear of the approaching train, then you will proceed to consider the facts and cir-
87 cumstances attending his attempt to cross the main track as detailed by the witnesses who saw the collision, and determine whether he exercised that degree of care and caution which a reasonable and prudent man paying proper attention to the situation and danger would have taken before hurrying upon the track or so close thereto as to be within reach of an approaching engine. A railroad track at any and all points of crossing is in itself a signal of danger. Before attempting to cross such track a person is bound to listen and to look and not to hurriedly walk or run carelessly or recklessly into or onto a place of possible danger. The railroad company has the lawful right of way along and over its tracks, and if, in attempting to cross such tracks, one omits to use his senses and exercise all the precautions which the situation de-

mands he is guilty of negligence, and so far contributes to his injuries as to deprive him of any right to claim damages of the railroad. If an approaching train at the place of crossing can be seen or heard by the use of one's senses of sight and hearing he must exercise them before attempting to cross. If the location and situation be such that an approaching train cannot be readily seen or heard, then more precaution must be exercised by stopping and using such care as will enable one to ascertain whether and to what extent there is risk or danger in moving onto or upon a place of possible or probable danger. If, therefore, you find from the evidence in this case that the plaintiff was familiar with the situation and dangers connected with the location of defendant's track and buildings at Jonesboro'; that on the occasion of the collision he hurr-edly, in a rapid walk, trot, or run, attempted to cross the track at the west end of the depot without looking or listening for an approaching or passing train, or that without stopping before passing on or so near to the track as to be within reach of the cross-beam of the engine if he could not see or hear the train, then he
88 was guilty of contributory negligence which will deprive him of the right to recover, notwithstanding there may have been negligence on the part of the def't in the running of its train at that point under the conditions existing there. It is shown that plaintiff was struck by the cross-beam of the engine as he stepped from behind and beyond the wall of the arch. He states that he has no recollection of ever seeing the engine. Several witnesses who saw the accident state that he ran into the engine. These witnesses are unimpeached, and should not be discredited upon the suggestion of counsel that their evidence has been given in the shape of depositions instead of producing them upon the stand. The plaintiff further states that the noise at the west end of the depot along which he was passing, produced (as he supposed) by the rumbling of trucks in the depot and the mill east of the depot, could not well be distinguished from that of an approaching train. The prevalence of such noise, if it existed, and the uncertainty of the source from which it proceeded imposed greater precautions on his part. If the noise of the approaching train was mistaken by him for that of the mill and the rumbling of trucks in the depot, he cannot cast upon the defendant the consequences of that mistake or thereby excuse himself in hurrying, without pausing and looking, into or upon a place of possible danger. The witness Patton states that he was standing at time of accident at the west end of the depot near the door through which plaintiff came when he went hurr-edly towards the track, and that he heard the whistle and bell of the approaching train from that position. Could plaintiff have heard the same if he had been paying attention to the matter? If so, he should have given such attention before attempting to cross the track, and not to do so would be negligence on his part.

The nature and extent of the injuries sustained by the plaintiff from the collision have been explained to you by Dr. Parks
89 and others. If you find from the evidence that the plaintiff was not guilty of contributory negligence, and further find

that def't, under the circumstances, was guilty of negligence in running its train, and that such negligence on its part was the proximate cause of the accident, then you will return your verdict for the plaintiff and award him compensation in damages. A def't charging contributory negligence must prove it by a preponderance of evidence. In assessing damages you will take into consideration his age, state of health, and capacity for earning money at the date of his injury; the expenses incurred for nursing and physicians' bills on account of said injury; the mental and physical suffering and agony endured in consequence of said injury; his loss of health, of body and mind, temporary or permanent; the loss also of ability or capacity for earning money and the consequent loss of profit reasonably to be expected from the practice of his profession; and you will assess such sum in gross as in your opinion will compensate him for such injuries and losses as were the natural result of the accident.

You cannot undertake to award damages by way of punishment upon def't. In some cases *punative* damages are allowed, but this is not such a case; and in respect to the losses sustained by the plaintiff you cannot properly consider the accounts he has made and failed to collect while practising his profession of medicine since the accident in the States of Ill., Pa., Florida, and Georgia.

In conclusion, gentlemen of the jury, you should consider this case solely upon its merits under the evidence and without prejudice or partiality for or against either side, but hold the scales in even balance and decide the questions of fact submitted to you for your determination, according to the weight and preponderance of the evidence, and return your verdict accordingly.

HOWELL E. JACKSON, *Judge*.

To which refusal and charge of the court and the exclu-
90 sion of evidence offered and to the action of the court in refusing a new trial plaintiff excepted and tendered this bill of exceptions, which was signed and sealed by the court and ordered to be made a part of the record in this cause.

HOWELL E. JACKSON,
Circuit Judge.

Endorsed: Bill of exceptions. W. C. Jones *vs.* E. T., V. & G. R. R. Co. Filed December 23rd, 1890. H. H. Taylor, clerk, by J. T. Carter, dep. clerk.

Citation. Filed January 7th, 1891.

UNITED STATES OF AMERICA, *ss:*

To the East Tennessee, Virginia & Georgia Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for

the sixth circuit and the eastern district of Tennessee, at Knoxville, wherein W. C. Jones is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Howell E. Jackson, judge of the United States circuit court for the sixth judicial circuit, at Knoxville, within the eastern district of Tennessee, this 6th day of January, 1891.

HOWELL E. JACKSON,
Circuit Judge.

Due service of the foregoing writ of error and citation ac-
91 knowledged this 7th day of January, 1891.

THE E. T., V. & G. R. R. CO.,
By HENDERSON, *Att'y.*

Appeal Bond. Filed January 7th, 1891.

Know all men by these presents that we, W. C. Jones, principal, and Chas. E. Dosser and James H. Dosser, sureties, are held and firmly bound unto the East Tennessee, Virginia and Georgia Railroad Company in the full and just sum of two hundred and fifty dollars, to be paid to the East Tennessee, Virginia and Georgia Railroad Company, its attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs and executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-third day of December, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a circuit court held at Knoxville, for the eastern district of Tennessee, in a suit depending in said court between W. C. Jones aforesaid, plaintiff, and said railroad company, defendant, a judgment final was rendered against said Jones for all the costs of the case aforesaid, and the said W. C. Jones, plaintiff as aforesaid, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the East Tennessee, Virginia and Georgia Railroad Company, citing and admonishing it to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said W. C. Jones shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

92 W. C. JONES, [SEAL.]
By H. H. INGERSOLL, *Attorney.*
CHAS. E. DOSSER.
JAMES H. DOSSER.

Approved:
HOWELL E. JACKSON,
Circuit Judge.

UNITED STATES OF AMERICA, } ss:
Eastern District of Tennessee, }

CIRCUIT COURT CLERK'S OFFICE.

I, H. H. Taylor, clerk of the United States circuit court for the eastern district of Tennessee, do hereby certify that the foregoing ninety-two pages comprise a full, true, and perfect copy of the record and testimony in the case mentioned in the caption, excepting that portion marked "Defendant's Exhibit No. 1," "Defendant's Exhibit No. 2," and "Defendant's Exhibit No. 3" to C. H. Waring's deposition, the originals of which are hereto attached.

In testimony whereof I hereunto subscribe my name officially and affix the seal of said court, at Knoxville, within said district and the sixth circuit, on this the 2nd day of March, A. D. 1891.

[The Seal of the Circuit Court, District of East Tenn.]

H. H. TAYLOR, *Clerk,*
By J. T. CARTER,
Dep. Clerk, U. S. Cir. Court, East'n Dist. of Tenn.

Clerk's fee for making transcript, $33.35.
Paid April 23, 1891.

H. H. TAYLOR, *Clerk,*
By J. T. CARTER,
Dep. Clerk.

93 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court, before you or some of you, between W. C. Jones, plaintiff, and East Tennessee, Virginia & Georgia Railroad Company, defendant, a manifest error hath happened, to the great damage of the said plaintiff, W. C. Jones, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 7th day of January, in the year of our Lord one thousand eight hundred and ninety-one.

[The Seal of the Circuit Court, District of East Tenn.]

H. H. TAYLOR, *Clerk*,
By J. T. CARTER,
Deputy Clerk, U. S. Circuit Court, Eastern District of Tenn.

Circuit Court of the United States, Eastern District of Tennessee.

Executed the above writ, as commanded, by sending to the Supreme Court of the United States, at Washington, a duly certified copy of all the record and proceedings had in this court and all things concerning the same in the case of W. C. Jones *vs.* East Tennessee, Virginia & Georgia Railroad Company.

Witness my hand and the seal of the said court, at office, in Knoxville, Tenn., this 6th day of June, 1891.

[The Seal of the Circuit Court, District of East Tenn.]

H. H. TAYLOR, *Clerk*,
By J. T. CARTER,
Deputy Clerk, U. S. Circuit Court,
Eastern District of Tennessee.

[Endorsed:] No. 762. W. C. Jones *vs.* E. T., V. & G. R. R. Co. Writ of error. Filed Jan. 7, 1891. H. H. Taylor, U. S. cir. c't cl'k.

94 UNITED STATES OF AMERICA, *ss:*

To the East Tennessee, Virginia and Georgia Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the sixth circuit and the eastern district of Tennessee, at Knoxville, wherein W. C. Jones is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Howell E. Jackson, judge of the United States circuit court for the sixth judicial circuit, at Knoxville, within the eastern district of Tennessee, this 6th day of January, 1891.

HOWELL E. JACKSON,
Circuit Judge.

Due service of the foregoing writ of error and citation acknowledged this 7th day of January, 1891.

THE E. T., VA. & GA. R'ROAD CO.,
By HENDERSON, *Att'y.*

[Endorsed:] No. 762. W. C. Jones *vs.* E. T., Va. & Ga. R. R. Co. Citation. Filed Jan. 7, 1891. H. H. Taylor, U. S. cir. c't cl'k.

Endorsed on cover: Case No. 14,782. E. Tennessee C. C. U. S. No. 253. W. C. Jones, plaintiff in error, *vs.* The East Tennessee, Virginia & Georgia Railroad Company. Filed July 28, 1891.

Office Supreme Court U. S.
FILED.
MAR 11 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894.

W C. JONES,
PLAINTIFF,
vs.
E. TENN., VA. & GA. R. R. CO.,
DEFENDANT.

NO. 253.

ERROR TO CIRCUIT COURT FOR EASTERN DISTRICT OF TENNESSEE.

BRIEF FOR PLAINTIFF.

HENRY H. INGERSOLL,
Of Counsel.

OGDEN SPOR. & CO., PRINT., CHI.

Supreme Court of the United States.

OCTOBER TERM, 1894.

NO. 253.

W. C. JONES,
Plaintiff in Error,

vs.

EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD COMPANY,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

This action, brought in 1883, was before this Court in 1888, when it was reversed and remanded, because of peremptory instruction by the Court to find verdict for the defendant. 128 U. S. 443-6.

At July term, 1889, there was a mistrial, and at January term, 1890, a verdict for plaintiff for $12,500. New trial was granted, and at the next term, November,* 1890, there was verdict and judgment for defendant, and plaintiff again brings error.

* The existence of Rule 35, promulgated in that month, was not known to counsel nor to the trial Judge when the Bill of Exceptions was made up and the Writ of Error was allowed. Wherefore the Assignment of Errors was not filed in the Court below, and counsel is constrained to assure the Court that a request to be heard will receive ready compliance.

STATEMENT OF CASE.

The action is to recover damages for personal injuries caused by negligent running of the defendant's locomotive upon the plaintiff. Accident occurred at Jonesboro, Tenn., just at the corner of the railroad depot. The single railroad track here ran between the large brick depot and the hotel immediately opposite—along the north side of the depot; and locomotives passed here not more than ten feet from the hotel and within fifteen inches of the solid wall of the depot. The entrance to the depot was at the west end; and the usual crossing-place between the depot and the hotel and passenger platform was at the northwest corner of the depot. Three or four feet west of this corner, and within two feet of a passing train was a high delivery-platform, between which and the depot wall was the usual passage for persons having business either as passengers or shippers with the Railroad Company.

On the morning of the accident, plaintiff having been in the depot to pay a freight bill and direct the movement of some machinery, came out of the depot by the usual door at the west end, and walking rapidly, as was his wont, down the steps, started to cross the track by the usual and only route, passing between the delivery platform and the corner of the depot. He could not see, and, listening, did not hear any approaching train. Just as he passed the depot corner the locomotive of a local freight-train from the east, running through the narrow pass between the depot and hotel at a rapid rate, estimated variously at from seven to fourteen miles miles an hour, struck him in the head with the end of the cross-beam, threw him violently against the platform, and ran on west more than 200 yards before stopping. Plaintiff was picked up for dead, but shortly rallied, and after a long confinement partially recovered, being permanently injured in body and mind.

STATE LAW.

"In order to prevent accident upon railroads the following precautions shall be observed: 4. On approaching a city or town the bell or whistle shall be sounded when the train is at the distance of one mile, and at short intervals till it has reached its depot or station; and on leaving a town or city the bell or whistle shall be sounded when the train starts, and at intervals till it has left the corporate limits.

"Every railroad that fails to observe these precautions or cause them to be observed by its agents and servants shall be responsible for all damages to persons or property occasioned by or resulting from any accident or collision that may occur."

Tennessee Code, §§1166–7.

ASSIGNMENT OF ERRORS.

I.

"Plaintiff offered to prove that before his injury accidents had occurred and persons had been injured at this platform by passing trains; but on objection of defendant the same was excluded." (*Rec.*, p. 17.)

II.

"Plaintiff offered to prove by the witness Jones that at the time of the accident there was much noise in the depot caused by the moving of freight and machinery and running of trucks over the floor, whereby the noise of the approaching train was rendered inaudible to him passing through the depot and on the platform to the track; but the Court excluded the fact as immaterial, to which ruling of the Court plaintiff, by his counsel, then and there excepted." (p. 43.)

III.

Plaintiff requested the Court to instruct the jury in regard to the signals required by the Tennessee statute, as follows (p. 50):

"This means that until the train reaches its usual stopping place at a station it shall sound at short intervals such alarm signals as will notify people of the approaching of the train and enable them to keep out of its way. The sound of the signal must be loud enough to be heard by persons giving attention at and around the depot of the railroad company; and if the depot be so located or constructed as to make it unusually difficult to hear at and around it, then the alarm

must be sounded louder and more frequently than usual, so that it may be audible to persons around the depot having business there and passing to and fro on such business with the company, and sufficient to warn them of the approach of the train. If in this case the agent of the defendant company failed to so sound the whistle or bell at or near the depot while approaching it as that it could be heard by plaintiff or any other person with the usual sense of hearing at the west end of the depot and about to cross the track at that place, then it would be responsible to plaintiff in damage for all injuries resulting from the accident or collision that occurred to plaintiff when so crossing the track, whether plaintiff's negligence contributed to the injury or not. Contributory negligence does not defeat this statutory action, but wherever it exists it operates only to reduce or mitigate damage. If, therefore, you find in this case that the defendant is guilty of statutory negligence, your verdict will be for plaintiff; but if you further find that plaintiff's negligence contributed directly to produce the injury, then, in estimating damages, you will reduce the same in proportion to the extent of such contributory negligence."

Which instruction the Court declined to give, and on this subject the Court premptorily instructed the jury as follows, (p. 55):

"The evidence in this case will not warrant you in finding that the defendant was in fault in the matter of 'signals' at short intervals as its train approached the station. Two or three witnesses for the plaintiff state that they heard no whistle sounded or bell rung as the train approached Jonesboro. They do not say that they would have heard said signals if they had been given, but merely that they did not hear them. This sort of negative testimony falls short of establishing affirmatively that such signals were not given, especially as other witnesses for the plaintiff and at least six unimpeached witnesses for the defendant, state positively that the train did, from time to time and at short intervals, sound its whistle and ring its bell as it approached the station; that the 'signals' given induced them to shut down the brakes. This is affirmative testimony to the fact that the signals required by the law of Tennessee were given, and it outweighs any presumption to the contrary arising from the circumstances that two or three persons did not hear any signals. So, under the evidence upon this point, you cannot properly find that defendant was guilty of 'negligence in failing to give 'signals' of its approaching train."

IV.

The Court refused to give the following request of plaintiff as instruction to the jury (p. 51):

"It is negligence to run a train at high speed through a town or city without giving such alarm signals as will warn people of its approach and enable them to avoid danger of collision with it, and especially so when approaching a crossing provided by the company itself for the use of its customers, particularly if the crossing be so located that it is difficult to hear and impossible to see an approaching train till within a single step of it.

In such cases the company must exercise the utmost caution to avoid injury, and give warning to those there on business and crossing on its invitation."

V.

The Court also declined to give the following request of plaintiff in charge to the jury (p. 51):

"A pedestrian is not bound to stop when about to cross a railroad track, but he must look and listen; but if defendant has so constructed its depot and placed its cars that, though looking, plaintiff could not see an approaching train as he came to the track, and listening with ordinary care he could hear no signal, and he is struck as soon as he comes in sight of the train by its running at a reckless rate at that place, then plaintiff's failure to stop sooner will not bar his recovery, for he is not bound to presume negligence on the part of defendant, but has the right to presume that it will give proper signals and not run at unlawful speed."

VI.

The Court declined to give the following request of plaintiff as instruction to the jury (p. 52):

"When there are obstructions, either natural or artificial, which obscure passing trains from approaching travelers, this is a circumstanee which demands of the company the exercise of increased diligence; and when the obstructions are upon the right of way of the Company and are of its own construction or exist by its permission, this is such negligence as may render it liable for injuries occurring at a crossing thus obscured.

And so here the erection and continued use of a depot so near to the main track that anyone having business there with the Railroad Company, and leaving said depot to return to the passenger platform by the usual passway could not see

an approaching train until he was within two feet of the track, is in itself negligence, and required, because of the extraordinary danger of the crossing, an extraordinary degree of care from the company in running its trains past said depot; and failure to use such care would make the company guilty of negligence."

VII.

The Court declined to give the following instruction requested by plaintiff, (p. 52-3):

"The negligence which will preclude a plaintiff from recovering in an action of this nature must be such as that he could by ordinary care have avoided the consequences of defendant's negligence.

For although there may have been negligence on the part of plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of defendant's negligence, he is entitled to recover.

A superior degree of diligence cannot be required. Ordinary care is sufficient. It is not the law that slight negligence on the part of the plaintiff will defeat his action. To do this his negligence must have been an efficient and proximate cause of the injury.

For though plaintiff may in some slight degree have been guilty of negligence, yet this would not prevent him from recovering damages caused by the negligence of the Railroad Company, provided that, notwithstanding plaintiff's slight negligence, if he was in the use of ordinary care, the Company could, by the exercise of the degree of care required of it under the circumstances, have avoided afflicting the injury."

VIII.

The Court instructed the jury as follows, (p. 56):

"No evidence has been introduced to show that there were any defects in the brakes or proper appliances for stopping the train, or that it was deficient in train force, and in the absence of such proof you should assume that the train was properly equipped."

IX.

The Court instructed the jury as follows, (p. 58):

"A railroad track at any and all points is in itself a signal of danger."

X.

The Court instructed the jury as follows, (p. 59):

"*If*, therefore, you find from the evidence in this case that the *plaintiff* was familiar with the situation and dangers con-

nected with defendant's track and buildings at Jonesboro; that on the occasion of the collision he *hurriedly*, in a rapid walk, trot or run, *attempted to cross the track* at the west end of the depot *without looking or listening* for an approaching or passing train, or *without stopping before passing on or so near to the track* as to be within reach of the cross-beam of the engine if he could not see or hear the train, then *he was guilty of contributory negligence* which will deprive him of the right to recover, notwithstanding there may have been negligence on the part of the defendant in the running of its train at that point under the conditions existing there."

BRIEF OF ARGUMENT.

I.

Evidence Rejected.

Because of the unusual nearness of the little delivery platform to the railroad track, and the special danger to which customers with this Railroad Company were daily subjected thereby, it was competent for plaintiff to show previous injuries to other persons at that special point, for the purpose of proving, not only the extraordinary danger of the situation, for which the Railroad Company was solely responsible, but also the fact that its attention had been called thereto by the occurrence of accidents from that very cause; and refusal of the Court to allow this proof was injurious to plaintiff's cause.

II.

For the same reason it was important to plaintiff's cause that the jury should know his environment of condition as well as place, so that they might intelligently judge and determine whether he ought under the circumstances to have heard an approaching train which he could not see, and therefore ought to have stopped and waited for the train to pass by. If, by reason of the Company's dangerous construction of its depot, he could not see the approaching train, and by reason of the noise in that depot at the time, he could not here the rumbling of the train nor any signal of its approach, then the jury might not have found him guilty of

negligence in going across the track, as they properly would, had conditions been such that he could have seen the approaching train, or as they might, if he could have heard it. Refusal to permit him to prove these conditions was erroneous, and the error was harmful to his cause.

III.

Peremptory Instruction.

The peremptory instruction of the trial judge against plaintiff on the first count was erroneous, because it was fairly on an open question of fact whether the company had complied with the statutory precautions; and, as remarked by Mr. Justice Miller at the former hearing of this case, "a due regard for the respective functions of the Court and the jury would seem to demand that this question should have been submitted to the jury, accompanied with such instruction as would secure a sound verdict." 128 U. S., 446.

The statement of the presiding Judge on page 55, that "at least six unimpeached witnesses for the defendant state positively that the train did from time to time and at short intervals sound its whistle and ring its bell as it approached the station; that the signals given induced them to shut down on the brakes," has no support in the record. Not a single brakeman or train-hand was produced by defendant at this trial; and the evidence so stated by the Judge was not given.

It is probable that the Judge fell into this obvious error from notes of a former trial, perhaps from a copy of the printed record used in this Court at the former hearing, and that he spoke from this evidence on another trial rather than the one now under examination.

But howsoever the mistake occurred, it is a plain, conspicuous and fatal error to the prejudice of the plaintiff, and in its nature and effect is the same error which caused the reversal at the former hearing.

It is true that mention is made by one or two witnesses for defendant of the whistle having been sounded at some dis-

tance from the depot; but since the statute was enacted for the avowed purpose of preventing accidents on the railroad, and signals were required as a warning to persons about the stations in towns and cities, it was for the jury to determine, not only whether there was a sound of the whistle or a ringing of the bell, but also whether, in view of the peculiar peril to persons at this depot, the bell or whistle was so sounded and at such short intervals as to give proper warning to persons at this place of danger — whether the signals were sufficient in fact.

In view of this function of the jury, plaintiff was entitled to the instruction requested by him, "that the sound of the signal must be loud enough to be heard by persons giving attention at and around the depot; and if it was unusually difficult to hear at and around it, then the alarm must be sounded louder and more frequently than elsewhere, so as to be audible to persons having business there, and sufficient to warn them of the approach of the train," (p. 50).

IV.

Requests Refused.

The duty to run slowly and give proper signals at such a crossing as this was properly set forth in the second request, and it should have been given to the jury, (p. 51).

Mackay vs. Railroad Co., 35 N. Y., 75.
Phil. R. R. Co. vs. Long, 75 Pa. St., 257.
Craig vs. N. Y. R. R. Co., 118 Mass., 431.

V.

A foot traveler has a right to presume that due caution will be observed, and there is no requirement upon him to stop before crossing a railroad track, provided he can look and listen while walking. The principle is correctly stated in the last part of the second request, and should have been so given to the jury (p. 51). The error of the refusal to give this is emphasized by the charge that a railroad track is in itself a signal of danger. (p. 58), and, if plaintiff....attempted to

cross the track at the west end of the depot . . . without stopping before passing on or so near to the track as to be within reach of the cross-beam of the engine, if he could not see or hear the train, then he was guilty of contributory negligence, which will deprive him of the right to recover, (p. 59).

Garland vs. N. W. Ry. Co., 8 Ill. App., 571.
Dolan vs. Del. Canal Co., 71 N. Y., 285.
Kellogg vs. N. Y. Cent. Ry. Co., 79 N. Y., 72.

VI.

The duty of the Company in running its trains past obstructions of its own construction and on its right of way was correctly stated in the third request, (p. 52), and it was error to refuse to deliver this instruction to the jury.

Ind. R. R. Co. vs. Street, 53 Ind., 143.
Richardson vs. N. Y. R. Co., 45 N. Y., 846.

VII.

So, too, the doctrine of the law in regard to contributory negligence was properly set forth in the fourth request for instruction, and the same should have been given as requested, (p. 53).

Davies vs. Mann, 10 M. & W., 545.

VIII.

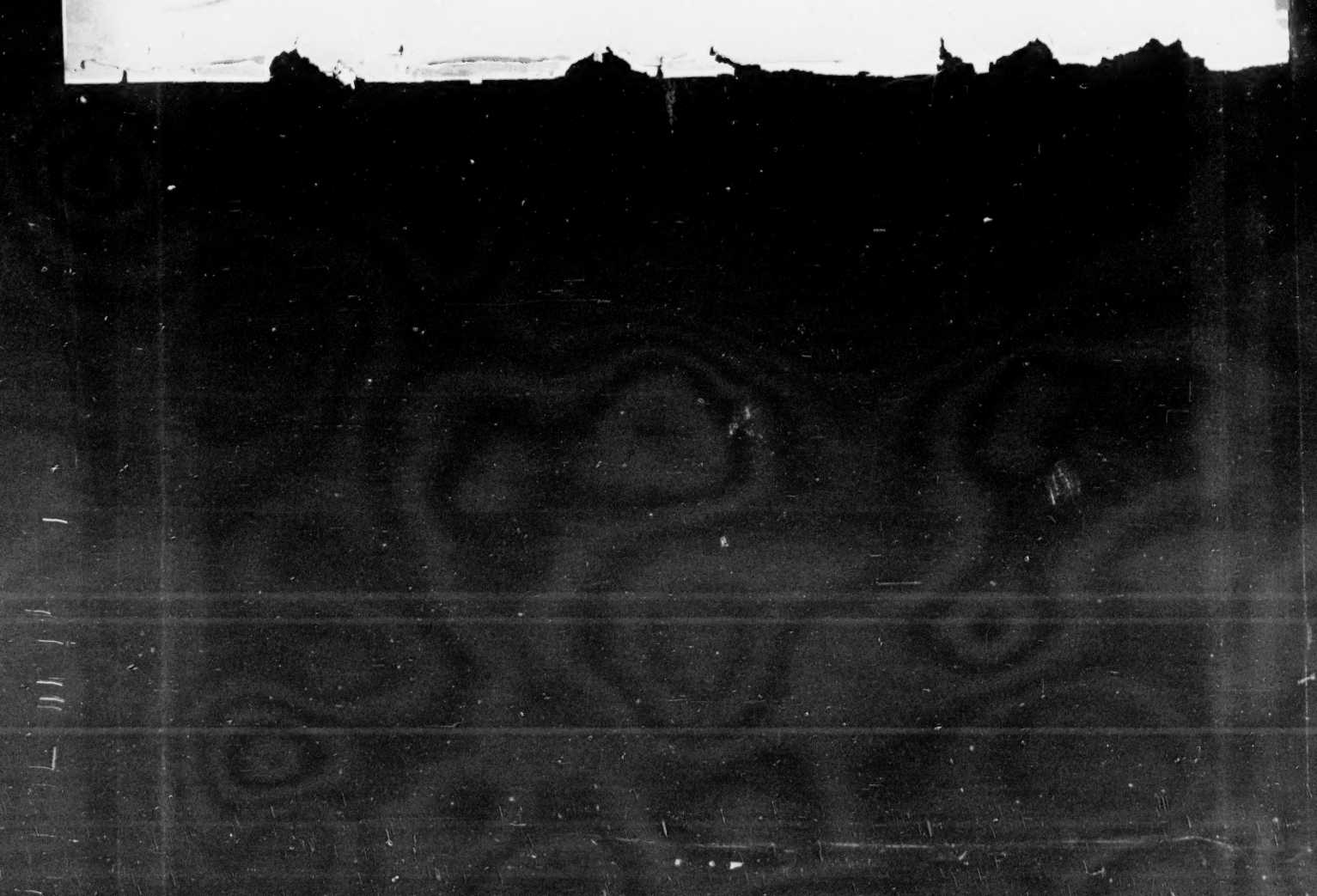
Erroneous Instruction.

The instruction on page 56, that, in the absence of direct proof that there were defects in the brakes or that it was deficient in train force, the jury should assume that the train was properly equpped, both in men and appliances, was erroneous under the facts of this case. The jury, on the contrary, were warranted to infer that the train was not properly equipped or managed, from the fact that it ran at such high speed, (say ten miles an hour), past a usual stopping place, and where, on that day it should have stopped; and they should have been left to draw their own inference from all the facts proven in the case.

The peculiar circumstances of this case, wherein it is apparent that the defendant company was in fault on account of the manner of running this train past this dangerous place of its own construction over one whom it had invited across its track by a dangerous way, on a mission of business, and who was returning lawfully, as he had come, would seem to require that the case should be passed upon by the common sense of a jury, without peremptory judicial instruction in any of its features, and that they should be allowed not only to find the facts, but to draw the proper inferences therefrom; or, as put by Mr. Justice Miller on the former hearing: "Submit to the jury the question whether the defendant Company is relieved from the liability incurred by it by reason of the acts of the plaintiff showing that in some degree he may not have been as careful as the most cautious and prudent man would have been." 128 U. S. 446.

For the errors assigned, plaintiff respectfully asks a reversal and remand of the case.

HENRY H. INGERSOLL,
Of Counsel.



Office Supreme Court, U. S.
FILED.
MAR 27 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1894.

W. C. JONES, PLAINTIFF IN ERROR,
vs.
E. T., V. & G. R. R. CO., DEFENDANT.
No. 253.

Error to Circuit Court for Eastern District of Tennessee.

Brief for Defendant.

LEON JOUROLMON,
of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1894.

No. 253.

W. C. JONES, *Plaintiff in Error,*

vs.

EAST TENN., VA. & GA. R. R. CO., *Defendant.*

BRIEF FOR DEFENDANT IN ERROR.

I.

NO ASSIGNMENT OF ERRORS.

Plaintiff in error wholly failed to comply with Rule 35 of this Court.

STATEMENT OF CASE.

The alleged negligence relied on by plaintiff was the rapid running of defendant's train by a dangerous crossing without giving signals of its approach.

The proof abundantly showed that the proper signals were given, and his Honor, Judge Jackson, so instructed the jury.

The defendant also relied on the contributory negligence of the plaintiff.

Plaintiff was familiar with the premises. He was at the depot to pay a freight bill and to instruct his drayman about removing some machinery. The drayman testifies that he and plaintiff were together and heard the train coming; that he told plaintiff he (Deere) could not get past the train, and they talked together about the train; and that plaintiff left him running. (*See Ev. Deere or Defre, Tr. p. 47.*) Plaintiff does not deny this, but says he does not remember it. Excuses his memory by saying that he has been insane since the accident and forgot everything, and "things are coming back" to him. (*Ev., p. 42.*) After leaving the drayman, plaintiff partly ran, and partly walked rapidly, through the depot, then along the platform, down the steps and across the side track and ran into the side of the engine which was passing through on the main track. Plaintiff says there was a box-car standing on the side-track and he could not see the train coming from the east without stooping; but two gentlemen, who had tried the experiment, testified they could see through the depot, fifty or sixty yards, when there was a car standing there. (*Ev. Graham and Weaver, Tr., pp. 44-45.*) Plaintiff admits he did not stop, and did not look or listen toward the east for any approaching train. He says he was thinking about his business, his machinery and getting it down to the new building. (*Plaintiff's Ev., Tr. pp. 42-3.*) Evidently he thought he could beat the train to the crossing, and took the risk. And now he cannot throw the cost of his experiment on the Railroad Company. This also appears to have been the opinion of the trial judge. (*See charge, Tr. pp. 57-8.*)

II.

REJECTION OF EVIDENCE.

1st. Error Assigned.

The evidence rejected was clearly incompetent.

(a) There is no statement in the proffer even, that the accident occurred from any sort of negligence on the part of defendant, nor that the persons injured were not injured solely by their own negligence.

(b) Defendant would have been entitled, on the admission of this evidence, to introduce rebutting evidence; and would

have been forced to do so, without notice, and without having such an issue tendered it.

(c) The Court and jury, instead of one case of alleged negligence, would have had several pressed upon them for trial.

2nd. Error Assigned.

The offered evidence of Jones, that there was noise in the depot which rendered the noise of the approaching train inaudible to him while he was in the depot and on the platform, was properly rejected for several reasons:

(a) It was not material in aid of plaintiff, because, as stated to the jury by Judge Jackson without objection from the plaintiff, the noise only made it more incumbent on plaintiff to look out for the train.

(b) It was not material, because the noise prevented plaintiff from hearing only while in the depot and on the platform; whereas the point at which plaintiff should have been listening was after he had left the platform and was crossing the side-track to the main track.

(c) The offered evidence was merely cumulative. The noise was proven by other witnesses, Guggenheim (*Tr. p. 17*) Rosenheim (*Tr. p. 21*) and Dosser, (*Tr. p. 36*) and was not controverted.

Where a fact is proven, it is not reversible error to reject cumulative evidence to the same effect.

Lucas vs. Brooks, 18 Wall., 436.
Watt vs. Starke, 11 Otto, 247.

(d) The witness, Jones, had already stated that he did not listen for the eastern train, and that his mind was pre-occupied; and it would hardly have been proper to then allow him to give his opinion to the jury why he did not hear the train.

(e) Even if erroneous, the error was innocuous, for in his charge the Court in stating the evidence says: "The plaintiff further states that the noise at the west end of the depot along which he was passing, produced (as he supposed) by the rumbling of trucks in the depot and the mill east of the depot, could

not well be distinguished from that of an approaching train." He thereby gave plaintiff benefit of the evidence.*

III.

EXCEPTIONS NOT DULY TAKEN.

The remaining assignments of error go to the charge of the Court. We first urge against them, that the exceptions relied on were not taken in time, nor are they specific.

(a) Exceptions to the action of a Court must be noted when taken.

Hunnicut vs. Peyton, 102 U. S., 354.

And no exception to charge or refusal to charge on request will be noticed in this Court unless the bill of exceptions shows, affirmatively, that it was taken before verdict, or even before retiring of the jury.

U. S. vs. Carey, 110 U. S., 51.
Stewart vs. Rauch, 128 U. S., 391.
Pacific Express Co., vs. Malin, 132 U. S., 528.
Anthony vs. L. & N. R. R. Co., 132 U. S. 182.
Foster's Practice, § 277, and cases there cited.

(a) The verdict and judgment in this case were on Nov. 11, 1890; (*Tr. pp. 15-16*), and the motion for new trial and refusal were forty-two days afterwards, on December 23, 1890 (*Tr. p. 16*.) And no exceptions appear to have been taken to the charge, or to the action of the Judge in refusing instructions, until after the motion for a new trial was overruled; and the exceptions appear to have been contemporaneous with tendering the bill of exceptions. (*See Tr. p. 60*).

*NOTE: There is a strong suspicion, arising from the record itself, that in preparing this bill of exceptions the evidence of W. C. Jones together with this exception was copied bodily from the first transcript. The evidence was taken only one year after the accident, when plaintiff was only twenty-three years old. (*Tr. pp. 40, 42.*) And the offer of proof and the exception taken are identical with those on the first trial, and pressed in this Court for a reversal in 1888. (*See Brief for Pff. in Error in case 58, October Term, 1888, p. 3*); while the charge of the trial Judge shows that this evidence, ruled out on the first trial, was admitted on the fourth.

(b) Moreover, no specific exceptions were then taken. All that was done was as follows:—"To which refusal and charge of the Court and the exclusion of evidence offered and to the action of the Court refusing a new trial plaintiff excepted and tendered this bill of exceptions." *(Tr. p. 60.)*

This was insufficient, and in clear violation of *Rule 4*.

The Court had declined to charge four sections of plaintiff's request except so far as given in the charge; and if the words "which refusal" refer to this action of the Court, it is impossible to tell which one of the four is referred to by the plaintiff.

Where a general objection is made, but no specific grounds given therefor, this Court will not consider the objection. *21 How. 331.*

Exceptions to be of any avail, must present distinctly and specifically the ruling excepted to.

Ins. Co., vs. Lea, 21, 1 Wall., 158.
Rogers vs. The Marshal, Wall., 644.

In Harvey vs. Tyler, 2 Wall, 328, plaintiff in error had submitted forty-six instructions in three series. The Court said: "It is a fair inference from the bill of exceptions that each of "the series was prayed for and excepted to as a whole. If so, "the proceeding was not only a clear violation of a rule of this "court; but if any proposition in the series ought to be rejected, "then the Court did not err in refusing the prayer, although "there might have been propositions in the series which, if asked "separately, ought to have been given. * * * Justice itself "and fairness to the Court making the rulings complained of, "require that the attention of the Court be specifically called to "the precise point excepted to. * * * This is not given "when pages of instruction are asked in one prayer, and, if "refused, are excepted to as a whole. We may rightfully expect "of counsel who prepare cases for this Court that they shall pay "some attention to the rules which we have framed for their "guidance in that preparation, as well as those principles of law "referred to, which are necessary to prevent the prayers which "the counsel has a right to make to the Court for laying down "the law to the jury, from being used as a snare to the Court "and an instrument for perverting justice."

Harvey vs. Tyler, 2 Wall, 328.

In Beaver vs. Taylor, 93 U. S. 46, plaintiff requested the Court to charge eight several propositions. The Court declined. Plaintiff excepted to the refusal, and, also "to so much of the charge "as given as was in conflict with and variant from the several "propositions" presented by him.

It was held: "That the entire series of propositions was "presented as one request, and if any one proposition was "unsound, an exception to a refusal to charge the series cannot "be maintained."

2. "If the entire charge is excepted to in gross, and any "portion of it is sound, the exception cannot be maintained."

Rogers vs. Marshall, 1 Wall, 644.
Harvey vs. Tyler, 2 Wall, 328.
Lansing vs. Wiswall, 5 Denio, 213.
Jones vs. Osgood, 6 N. Y., 233.
Caldwell vs. Murphy, 11 N. Y. 416.
Walsh vs. Kelly, 30 N. Y., 556.

3. "An exception to such portions of a charge as are variant "from the requests made by a party, not pointing out the vari- "ances, cannot be sustained." Citing.

Walsh vs. Kelly, 30 N. Y., 556.
Regua vs. Rochester, 45 N. Y., 129.
Agault vs. Bk., 47 N. Y., 570.

"It is not the duty of a judge at the Circuit Court, or at an "appellate Court, to analyze and compare the requests and the "charge, to discover what are the portions thus excepted to. "One object of an exception is to call the attention of the Circuit "Judge to the precise point as to which it is supposed he has "erred, that he may then and there consider it, and give new and "different instructions to the jury, if in his judgment it should "be proper to do so." Citing.

Agault vs. Bk., 47 N. Y., 576.

"An exception in the form we are considering entirely defeats "this object."

Beaver vs. Taylor, 93 U. S., 46.

If the Court can properly consider the questions raised by plaintiff upon the charge and refusals to charge, we present very briefly the merits.

IV.

ALLEGED ERRORS IN CHARGING JURY.

3rd. Error Assigned.

The instruction requested was not sound. The Statute provides what signals shall be given, and it does not provide that they shall be such alarm signals as will actually notify people and enable them to keep out of the way. Nor does the Statute provide that they shall be louder or more frequent in one case than another. Plaintiff's counsel gets statutory negligence and his ideas of common law negligence mixed in his request.

We do not understand that the Court gave peremptory instructions on the "first count;" but that the Court instructed the jury as to the weight to be given the evidence on one ground of negligence alleged in the second or amended declaration. He directs no verdict on this point.

Moreover, the instruction is sound.

4th and 5th. Errors Assigned.

The second section of the instruction requested contains several propositions which could not have been properly given; for instance: "It is negligence to run a train without brakes or with broken or disordered brakes" &c. There was neither allegation nor syllable of proof to call for such instruction. And again: "In such cases the company must exercise the utmost caution to avoid injury," &c.

A pedestrian is bound to stop, if it is necessary to stop in order to look and listen for an approaching train. And this is especially so when he knows, as plaintiff did, that a train is actually appoaching and near at hand.

6th. Error Assigned.

The first clause of the third section of instruction requested could not have been properly charged, because there was no proof of negligent construction.

And the third clause of the same section could not have been properly charged, because it erroneously assumes that plaintiff could not see the coming train until he got within two feet of the track; while the proof shows that he could see from the side

track, by the box car, and also after he had left the side track four or five feet before he reached the track. (*See Ev. Grisham, Weaver and Waving, Tr. pp. 44, 45, 46*).

7th. Error Assigned.

The doctrine of contributary negligence, as stated by plaintiff's counsel, was entirely too one-sided to suit the trial Judge; and thereupon he stated it as applicable to the facts of this particular case, and stated it correctly.

8th. Error Assigned.

In this matter, as well as upon the entire case, the Court will find upon reading the charge of the trial Judge, that the law was fully and soundly given to the jury.

This case has been before the Courts for twelve years. Three trial Judges, with the plaintiff and witnesses immediately before them, have been unable to see that plaintiff is entitled to a recovery. It would seem that the litigation should end.

There is no reversible error in the record, and defendant respectfully asks an affirmance.

W. A. HENDERSON,
LEON JOUROLMON,
Counsel for Deft.